IN THE SUPREME COURT

—OF THE— 160-691

UNITED STATES

A. B. KAHNWEILER AND BROTHER,
Plaintiffs in Error;
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK,
Defendant in Error.

743

PETITION FOR WRIT OF CERTIORARI.

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Solicitor for the Phenix Insurance Company, of Brooklyn, New York.

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Of Counsel for Petitioner.

Printed at Washington, Printing Office, Judiciary Square.

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To the Honorable Supreme Court of the United States:

Your petitioner, The Phenix Insurance Company, of Brooklyn, New York, now and for ten years last past, a body corporate, organized under the laws of the State of New York, and a citizen of said State, and as such during all such time engaged in the business of insuring property

against loss or damage by fire within the State of Kansas and elsewhere, hereby prays your Honorable Court to issue your writ of Certiorari to the United States Court of Appeals for the Eighth Judicial Circuit, commanding said United States Court of Appeals to certify to your Honorable Court the record of its proceedings in the cause heretofore pending and determined in said Court, wherein A. B. Kahnweiler and Brother (hereinafter named and called Kahnweiler Brothers) were plaintiffs in error, and The Phenix Insurance Company, of Brooklyn, New York, was defendant in error, which cause was heard on a writ of error, issued by the said United States Circuit Court of Appeals to the United States Circuit Court for the District of Kansas, First Division, a copy of the record of said cause in the said United States Circuit Court of Appeals, is herewith filed and made a part of this application

Your petitioner further shows that it will appear from said record that said Kahnweiler Brothers on the 13th day of December, 1887, they then being citizens of the State of Kansas, entered their action in a civil cause at law, other than an equity or admiralty cause, in the state District Court in and for the County of Douglas, and State of Kansas, against your petitioner, then a body corporate organized under the laws of the State of New York, and a citizen of said State, in which action at law said Kahnweiler Brothers claimed a recovery against your petitioner in the sum of $2,500,00, with 7 per cent. interest per annum thereon upon a policy of insurance, which policy of insurance was made, executed and delivered within the said State of Kansas. The petition in which cause and the policy of insurance upon which said action was founded, are set out on pages 3 to 14 of the

record of said cause, which record is herewith filed.

Your petitioner further shows that upon its petition therefor, said cause was removed to the Circuit Court of the United States, for the District of Kansas, on the 22d day of November, 1887; and your petitioner appeared therein and filed its answer in said cause under the laws, forms and course of proceedings pertaining to Courts of Record in said State of Kansas; and the said Kahnweiler Brothers therein filed their reply, and issues were joined upon said petition and answer, according to the practice, pleadings, forms and mode of procedure at that time existing in like causes in courts of record in the State of Kansas; and afterwards and on January 3rd, 1889, said cause was tried in said United States Circuit Court for the District of Kansas, before a jury, upon the pleadings therein, and the evidence of said Kahnweiler Brothers offered on said trial, and upon the demurrer of your petitioner offered to such evidence, the same was sustained by said United States Circuit Court; and thereon said Kahnweiler Brothers filed their motion for a new trial; and afterwards and on September 4th, 1893, said motion for a new trial was overruled, and judgment rendered therein in favor of your petitioner for costs; the motion, decision and judgment of which court is found on pages 29 to 30 of such annexed record filed herewith.

Your petitioner further shows that on the 11th day of November, 1893, the said Kahnweiler Brothers sued out their writ of error to the said United States Circuit Court of Appeals for the Eighth Judicial Circuit, and assigned errors in the trial of said cause as specified in the record filed herewith at page 34 thereof.

Your petitioner further shows that upon the hearing of said writ and said assignments of errors and on the 26th day of April, 1895, said United States Court of Appeals, then sitting at the City of St. Louis, in the State of Missouri, did file its certain opinion reversing such judgment of the said United States Circuit Court for the District of Kansas, First Division, and ordered said cause remanded for further proceedings therein in accordance with said opinion.

Your petitioner further shows that the term of the said United States Circuit Court of Appeals being about to close, and a term of said Court to be begun at the City of St. Paul, in the State of Minnesota, said United States Circuit Court of Appeals did on the application of your petitioner make an order extending the time within which your petitioner might file a petition for rehearing to the 29th day of May, 1895. That on said May 29th, 1895, such petition for rehearing was filed as appears on page 51, *et seq* of the record filed herewith.

Your petitioner further shows that on the 3rd day of June, 1895, said petition for a rehearing was overruled and denied by said United States Circuit Court of Appeals, and said case was remanded to the said United States Circuit Court for the District of Kansas, First Division, for further proceedings in accordance with the said opinion and mandate of the said United States Circuit Court of Appeals.

Your petitioner further shows that in said opinion the following propositions are stated, held and determined by said United States Circuit Court of Appeals:

1. At page 42 of annexed record, that the perform-

ance of the conditions contained in the said insurance policy, and as alleged in the petition of said Kahnweiler Brothers, was not properly controverted by the general denial in the answer of your petitioner as filed in said cause, and that the alleged performance of said conditions could only be controverted by a specific denial of each and every condition of said policy which your petitioner claimed had not been performed by said Kahnweiler Brothers.

2. That it was further determined by said United States Circuit Court of Appeals (shown upon page 43 of annexed record), that by the failure of said Kahnweiler Brothers to show a compliance with and performance of the conditions precedent as contained in said policy, their cause of action was not barred but that the suit was only suspended or abated thereby.

3. That it was further determined by said United States Circuit Court of Appeals (as shown on page 44 of the record filed herewith) that the conditions of said policy of insurance which provided that in case of failure to agree as to the amount of the loss, the same should be submitted to impartial arbitrators whose decision should be final as to the amount of such loss, together with the clause that no suit or action for the recovery of the amount claimed on said policy should be sustainable in any court of law or equity until after an award should have been obtained fixing the amout of such claim, and the further clause that such arbitration was agreed to be a condition precedent to any action (which clauses are found on pages 8, 9, and 10 of annexed record) did not apply or take effect or become conditions precedent to such action unless a demand for such arbitration was

shown to have been made by your petition and refused by said Kahnweiler Bros.

4. That it was further determined by said United States Circuit Court of Appeals, as appears at page 47, of annexed record, that after the failure of your petitioner and said Kahnweiler Brothers to agree as to the amount of the loss, and after the offer of your petitioner to pay the amount actually due from your petitioner upon such loss, that your petitioner could not rely upon the failure to arbitrate, because in the discussion of the claims made by said Kahnweiler Brothers, the agent of your petitioner remarked, "We will beat you before a farmers' jury."

Your petitioner further shows that the said cause in which said order of said United States Circuit Court of Appeals was made remanding the same, was a case made final in the United States Circuit Court of Appeals. That the amount in controversy in said action is the sum of $2,500.00 exclusive of interest and costs; that a review and determination by this Honorable Court of the said decision of the said United States Circuit Court of Appeals is necessary to secure uniformity of decisions upon the points therein decided.

Your petitioner further shows that upon a retrial of said cause in and by the said United States Circuit Court for the District of Kansas, First Division, under the said decision and mandate of the said United States Circuit Court of Appeals it will be necessary for said United States Circuit Court for the District of Kansas, to adhere to the practice, pleadings and forms in the said state of Kansas, and to the statutes and decisions relating thereto as stated in your petitioner's petition for re-hearing at pages

59 to 64 of the annexed record, or to disregard such practice, pleadings, forms and proceedings and follow the pleadings and forms as stated in said opinion of said United States Circuit Court of Appeals, which, your petitioner shows, are the practice and proceedings in force in the state of Kentucky, and under the Common Law Procedure Act of England; and also upon such retrial to either regard the said decision and mandate of said United States Circuit Court of Appeals, Eighth Circuit, or to disregard the same, and adhere to the construction of said clauses contained in said policy of insurance, relating to arbitration, as stated by the United States Circuit Court at pages 26 to 30, of annexed record, and also to the construction of such clauses as stated by this Honorable Court in the cases of Hamilton vs. The Home Insurance Company, 137 U. S. 370, and Hamilton vs. Liverpool, etc., Insurance Co., 136 U. S., 242, and cases there cited, and also in the case of the United States vs. Roberson, 9 Peters, 319, and also the decision of the United States Circuit Court of Appeals, First Circuit, in the case of The Mutual Fire Insurance Company vs. Alvord, 61 Fed. R. 752; and further upon such retrial to follow such mandate and decision of said United States Circuit Court of Appeals, in said cause as to said claimed waiver, or estoppel, as stated on page 47, of annexed record, or to disregard the same and to adhere to the decisions and principles stated in your petitioner's petition for a re-hearing, at pages 67 to 68, of annexed record.

Your petitioner further shows that a writ of certiorari is necessary to review said decision and mandate of said United States Circuit Court of Appeals, Eighth Circuit, to prevent extraordinary inconvenience and em-

barrassment in the further proceeding in and trial and disposition of such cause, and in the hearing and determination thereof by said United States Circuit Court for the District of Kansas, First Division, and to enable said court on the trial thereof to avoid the making of rulings and decisions therein which must either conflict with the rulings and decisions of this Honorable Court in like cases, or conflict with the said decision and mandate of the said United States Circuit Court of Appeals, and to enable the said United States Circuit Court for the District of Kansas to avoid a conflict with the decisions of this Honorable Court or of the said United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner further shows that it is without remedy except by the exercise of the power conferred upon this Honorable Court under Section 6, of the Act of Congress, approved March 3rd, 1891, entitled: 'An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and other Purposes.'

Your petitioner further shows that prior to the filing of this its petition, a copy thereof was furnished, and notice of the filing of the same given to the Honorable Counsel for the said Kahnweiler Brothers.

WHEREFORE, your petitioner prays that your writ of Certiorari may issue, and that the record of said cause may be required to be certified to this Honorable Court by Certiorari or otherwise for review and determination, and that the said Honorable United States Circuit Court of Appeals for the Eighth Circuit, be directed to recall its said decision and mandate in said cause from the said

United States Circuit Court for the District of Kansas, First Division, until the final order of this Court herein, and that this Honorable Court will exercise the same power and authority in the premises as though this cause had been brought to this Honorable Court for review by writ of error or appeal.

W. M. Jackson

Solicitor for the Phenix Insurance Company, of Brooklyn, New York.

Henry Ellington

W. W. Guthrie

Of Counsel for Petitioner.

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stated in your petitioner's petition for rehearing at pages 59 to 64 of the annexed record, or to disregard such practice, pleadings, forms and proceedings and follow the pleadings and forms as stated in said opinion of said United States Circuit Court of Appeals, which, your petitioner shows, are the practice and proceedings in force in the State of Kentucky, and under the Common Law Procedure Act of England; and also upon such retrial to either regard the said decision and mandate of said United States Circuit Court of Appeals, Eighth Circuit, or to disregard the same, and adhere to the construction of said clauses contained in said policy of insurance, relating to arbitration, as stated by the United States Circuit Court at pages 26 to 30, of annexed record, and also to the construction of such clauses as stated by this Honorable Court in the cases of Hamilton vs. The Home Insurance Company, 137 U. S., 370, and Hamilton vs. Liverpool, etc., Insurance Co., 136 U. S., 242, and cases there cited, and also in the case of the United States vs. Roberson, 9 Peters, 319, and also the decision of the United States Circuit Court of Appeals, First Circuit, in the case of The Mutual Fire Insurance Company vs. Alvord, 61 Fed. R. 752; and further upon such retrial to follow such mandate and decision of said United States Circuit Court of Appeals, in said cause as to said claimed waiver, or estoppel, as stated on page 47, of annexed record, or to disregard the same and to adhere to the decisions and principles stated in your petitioner's petition for a rehearing, at pages 67 to 68, of annexed record.

Your petitioner further shows that a writ of certiorari is necessary to review said decision and mandate of said United States Circuit Court of Appeals, Eighth

Circuit, to prevent extraordinary inconvenience and embarrassment in the further proceeding in and trial and disposition of such cause, and in the hearing and determination thereof by said United States Circuit Court for the District of Kansas, First Division, and to enable said court on the trial thereof to avoid the making of rulings and decisions therein which must either conflict with the rulings and decisions of this Honorable Court in like cases, or conflict with the said decision and mandate of the said United States Circuit Court of Appeals, and to enable the said United States Circuit Court for the District of Kansas to avoid a conflict with the decisions of this Honorable Court or of the said United States Circuit Court of Appeals for the Eighth Circuit.

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WHEREFORE, your petitioner prays that your writ of Certiorari may issue, and that the record of said cause may be required to be certified to this Honorable Court by Certiorari or otherwise for review and determination, and that the said Honorable United States Circuit Court of Appeals for the Eighth Circuit, be directed to recall

its said decision and mandate in said cause from the said United States Circuit Court for the District of Kansas, First Division, until the final order of this Court herein, and that this Honorable Court will exercise the same power and authority in the premises as though this cause had been brought to this Honorable Court for review by writ of error or appeal.

H. M. JACKSON,

Solicitor for the Phenix Insurance Company, of Brooklyn, New York.

Henry Elliston,

W. W. GUTHRIE,

Of Counsel for Petitioner.

FILED.
NOV 20 1895
JAMES H. McKENNEY,
CLERK.

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STATEMENT OF CASE AND BRIEF OF DEFENDANT IN ERROR ON PETITION FOR WRIT OF CERTIORARI.

HORACE M. JACKSON,
Attorney for Defendant in Error and Petitioner.

HENRY ELLISTON,
Of Counsel for Defendant in Error and Petitioner.

O'CONNELL & WOODHOUSE, Printers, Atchison, Kansas.

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STATEMENT OF CASE AND BRIEF OF DEFENDANT IN ERROR ON PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The case as pending in this Court is upon a petition for Writ of Certiorari under section six (6) of the Appellate Court, Act of March 3, 1891, to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in the above entitled cause, which is

made necessary by the construction placed upon the decision of this Honorable Court of Hamilton vs. Ins. Co., 136, U. S.. and the conflict between such construction and the constructions of other Federal Courts.

This case was commenced in the State Court of the State of Kansas in and for the county of Douglas against the defendant in error (a corporation and citizen of New York) to recover the amount of an insurance policy executed by it to the plaintiffs in error (citizens of Kansas) for the sum of $2,500. The policy contained a clause requiring the amount of value and damages to be determined by arbitration in case of failure of the parties to agree as to the amount thereof. Such arbitration to determine only the amount of the true value of and damage to the property destroyed or injured and not to determine any other fact or question in the case.

There was no provision in the policy requiring demand for arbitration to be made by the insurer. (Page 8 of record, par. 10 of policy.)

It was also provided in the policy that "no suit or action against the company should be sustainable in any court of law or chancery until after an award had been obtained fixing the amount of the loss," in the manner stated, and was made a condition precedent to any action on such policy. (Record, page 10, par. 12, of policy.)

It was also provided, by the terms of said policy, that the amount of the loss or damage should be paid sixty days after proofs had been made and "the loss

shall have been ascertained and proved in accordance with the terms and provisions of this policy." (Record, page 4, par. 1.)

The petition alleged the insurance and the destruction of the property insured, the giving of the notice of loss, the service of proofs of loss and that plaintiffs "had otherwise performed all of the conditions of said policy on their part." (Record, page 14, par. 5 of said petition.)

On removal of such cause to the United States Circuit Court for the District of Kansas an answer was filed admitting the making of the policy, the destruction of the property insured, stating the amount of the liability under such policy, if any existed, and by the fifth ground thereof alleging that the property was wilfully burned and destroyed by the plaintiffs for the purpose and with the intention of cheating and defrauding the defendant and such other companies as had issued policies aggregating the sum of $38,500.00 on such property. (Record, page 21.)

To which answer a reply was filed, denying generally each and every allegation thereof. (Record, page 22.)

Such pleadings were framed under the code of Civil Procedure of the State of Kansas, and stated the issues upon which said cause was subsequently tried before the Honorable C. G. Foster, District Judge.

Upon the trial of said cause it appeared from the testimony of the plaintiffs that they had stated to the adjuster for the defendant the amount of goods purchased,

the amount of freights paid thereon, the amount of sales as shown by the accounts of plaintiffs, the amount of profits, and that the net balance from such statement, after deducting 10 per cent for depreciation and adding $557.06 for freight, made the total amount of such loss $21,982.62. (Record, page 32.)

It also appeared from the testimony of the plaintiffs that defendants' adjuster offered them $22,700.00 on behalf of twenty-one companies which had issued policies upon said property, and stated that he was ready to pay the proportion of that amount due from the defendant company; that plaintiffs then stated that "they had over $45,000.00 worth of loss and would not accept any such settlement." (Record, page 31.)

The plaintiff having rested their case the defendant demurred to the evidence, for the following reasons:

"I. Because upon the pleading and evidence the plaintiffs are not entitled to recover.

II. Because the evidence shows that the plaintiffs did not make and serve proofs of loss within the time required by the terms of the policy.

III. Because the evidence does not show that before the commencement of this action there was any arbitration, (or) award as to the amount of damages, while it does appear from the plaintiff's evidence that there was a difference between the plaintiff and defendant as to the amount of loss mentioned in the petition." (Record, page 33.)

Which demurrer was sustained by the Court, and plaintiffs filed a motion for a new trial upon four grounds, all of which relate to the error of the Court in

holding that an arbitration was a condition precedent to the right of plaintiffs to maintain such action. (Record, page 35.)

Upon the submission of said motion for a new trial the same was overruled by the Court and petition in error allowed to the United States Circuit Court of Appeals, Eighth Circuit. (The opinion of the Court overruling such motion for new trial is found on pages 26–29 of printed record.)

Upon the submission of said cause in said Circuit Court of Appeals the decision of the trial court was reversed and thereon defendant in error filed its petition for rehearing, which petition was denied. (Record, pages 51–69.)

And thereon a petition for Writ of Certiorari was filed with a certified copy of such record. (The opinion of the Honorable United States Circuit Court of Appeals is found on pages 40–47 of record.)

Such decision of the trial court was reversed upon the following grounds as stated in the opinion of the Honorable Circuit Court of Appeals.

I. That the general denial in the defendants answer to the allegations of the complaint (petition) which alleged that the plaintiff had performed all of the conditions of said policy on their part, did not controvert such allegation of due performance.

II. That as the complaint (petition) contained the

averment that plaintiffs had "performed all of the conditions of said policy on their part," and as the answer to such allegation was a general denial, such answer did not put in issue the allegation that the plaintiffs had complied with the conditions of the policy as to arbitration, and also that the general allegation of due performance was not properly controverted within the meaning of the Kansas Code, by such general denial, and in support of this proposition the Honorable Circuit Court of Appeals cites several authorities, notably decisions of the Kentucky Court, and also Newman's Pleading and Practice (a treatise on the Kentucky code of procedure), also several English authorities, which are based upon the Common Law Procedure Act.

III. Because at the time such estimate of $22,700 loss, and offer to pay by defendant company, and in reply to the demand of $38,500 (the total amount of insurance) by plaintiff, defendants adjuster said, "We'll beat you before a farmers' jury in your own court."

BRIEF.

First.—To determine the question of pleading and the effect of a general denial to an allegation of the performance of conditions precedent, it is necessary to compare the Code of Procedure of the State of Kansas with the Code of Kentucky and the Civil Procedure Act of England, and also with the rule as stated in the authorities cited by the Honorable Circuit Court of Appeals,

and which are wholly unlike, the former permitting a *general* denial, the others requiring a specific denial of every controverted allegation of the petition.

The Code of Civil Procedure of the State of Kansas provides:

"SECTION 4205. In pleading the performance of conditions precedent in a contract it shall be sufficient to state that the party performed all the conditions on his part, and if such allegations be controverted the party pleading must establish on the trial the facts of such performance."

The question then to be determined is how such allegations of performance of conditions of a contract may be "controverted" under the Kansas Code. It is provided therein:

"SEC. 4177. The answer shall contain, I. A *general or specific* denial of each material allegation of the petition controverted by the defendant."

Clearly the denial of the answer by which a material allegation of the petition is controverted may be either general or specific.

It cannot be maintained that a defendant may not rely upon a *general* denial when it is expressly provided by such statute that a general denial shall controvert the allegations of the petition. A specific denial is a denial of each and every allegation of the petition which is sought to be controverted, that is, if a defendant in his answer desires, he may state a specific denial of each allegation, in which case he must set out so much of

such allegation of the petition as is controverted and then specifically deny each allegation, but he is not compelled so to do. He may state a general denial, and this is the usual course of practice in the State of Kansas.

The allegations of the answer controverting those of the petition must be either *general or special*. It cannot be both, and a general denial puts in issue every allegation as fully as could be done by a specific denial.

This is the rule as stated in 1 Nash Pl. & Pr. (4 ed.) 176, and on the same page the author says, "let the denial be general if the truth will admit of it."

The Nebraska Code of Civil Procedure is identical with that of Kansas in that respect and the same rule is stated by Judge Maxwell in his work on Code Pleading, page 385.

1. Nash, Pl. & Pr. (4 ed.) 164, states that the "Codes of Ohio, Kansas and Nebraska are substantially alike in regard to an answer."

Also at page 169, the author says that "a denial may be either general or specific; a general or specific denial of each material allegation of the petition controverted by the defendant" and at page 170 speaking "of general denial," the author says—

"A general denial is one which meets all of the material allegations of the petition with a negative and compels the plaintiff to prove them in order to recover * * * * * * they deny all the material allegations of the petition, puts them in issue and nothing more. The simple inquiry is, has the plaintiff proved what he has alleged in his petition?"

Again on page 172, the author after citing numerous authorities, says—

"These cases show what is meant by the term *general denial*:—it is a denial which meets all of the averments of the petition, without going over them in detail, and in that way making the answer a copy of the petition with a negation added to it. This serves only to increase the length of the record without an advantage to any one."

The construction of the Kansas Code, as claimed by the defendant in error, was early established by the Supreme Court of that State in Perkins vs. Ermel, 2 Kas., 325 at 330, where the Court says: "A general denial under the Code is equivalent to the plea of general issue at common law and traverses every material allegation of the petition and puts the plaintiff upon the proof of his cause of action." Affirmed in Ins. Co. vs. Thorp, 48 Kas., 239 at 243, in which case the petition contained the same allegation of performance of conditions precedent, controverted by a *general* denial in the answer, held that performance of such conditions was put in issue. Indeed, it is difficult to see how any other construction could be placed upon such statute which provides: "And if such allegations be controverted the party pleading must establish on the trial the facts showing such performance."

The plaintiff in an action is permitted to allege generally that he duly performed all the conditions on his part, which is equivalent to the separate allegation of each condition followed by the allegation of the performance thereof. In such case, under the general issue,

the party alleging the performance would be compelled to prove the performance of each and every condition so alleged, and the statute provides that such allegation of the petition may be put in issue by a general or specific denial, and when so put in issue the plaintiff must prove every fact necessary to a recovery.

Newman's Pleading and Practice (upon the Kentucky Code), the Common Law Procedure Act of England and the Code of California, require that the answer of the defendant shall contain a *specific denial* of each and every allegation of the petition which is controverted and includes the specific denial of the performance of each and every condition of the contract sued upon, as plainly appears from the decisions of the Court of Kentucky, cited by the Honorable Circuit Court of Appeals.

The provision of the Code as existing in New York, Ohio, Kansas and Nebraska, authorizing a *general denial*, is not included in the Code of Kentucky nor in the English Procedure Act, under which the decisions cited by the Honorable Circuit Court of Appeals were rendered.

The general allegation in the petition or complaint is permitted in nearly all of the "Code" states, but the codes as to the manner of controverting such allegations are not uniform.

In Florida, Iowa, Mississippi and New Jersey, the *facts* relied upon to controvert such allegations *must be specifically stated*, and in Arkansas, California and Minnesota, there must be a *specific denial.*

Abb. Trial Brief on Pleading, 475, §§ 576–7.

Mossness vs. Ins. Co. (Minn.), 52 N. W., 932.

The decision of this Honorable Court in the cases of Hamilton vs. L. & L. & G. Ins. Co., 136 U. S. 242, and Hamilton vs. Home Ins. Co., 137 U. S., 370, cited as supporting the decision of the Circuit Court of Appeals do not sustain such decision. Such actions were upon policies of insurance which provided that if any differences should arise as to the amount of loss or damage such differences should be submitted to arbitrators, "at the written request of either party." Under such decision arbitration was not a condition precedent to action unless demanded by the insurer, and if the insurer relied upon the failure to arbitrate it must prove that it demanded arbitration and that the insured had refused; until demand for such arbitration such condition of the policy could not suspend the right of action, and until such demand it was a collateral condition. It rested upon an initial step to be taken by the insurer and could only be presented by a direct allegation in the answer, such as would have been necessary in case of accord and satisfaction or other similar affirmative defense. Such decisions do not therefore support the conclusions reached by the Honorable Circuit Court of Appeals.

It is the more important in this case to have this question correctly settled, for that under such decision of the Circuit Court of Appeals it will be necessary to amend the answer of the defendant, and before amending the same it should be settled whether in amending

such answer the same shall conform to the Code of Procedure of the State of Kansas or to that of Kentucky, California or England.

It cannot be necessary to cite authorities to this court upon the proposition that the practice, pleadings, forms and modes of proceeding in civil causes in the Federal Courts, shall conform to the practice, pleadings and forms existing in the Court of Record of the State within which the Circuit Court is held as it is so enacted in section 914, of the Judiciary Act.

Second.—The Honorable Circuit Court of Appeals also erred in holding that the failure of the plaintiffs on the trial to prove the performance of the conditions precedent to recovery, to-wit: the arbitration, could only operate to suspend the cause of action and abate the suit.

By the terms of the policy sued upon it is "expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided," which is agreed to be a condition precedent.

Pleas in abatement are those which set up matter tending to defeat or suspend the suit or proceedings in which they are interposed, but which do not debar the plaintiff from recommencing at some other time or in some other way.

I Encycl. Pl. & Pr. 1.

Pitts Sons Mfg. Co. vs. Commercial Nat. Bank, 121 Ill., 587.

The authorities cited in the decision of the Circuit Court of Appeals are to like effect and the only decision cited in that opinion (1 McCrary, 123, by Caldwell, Judge,) was rendered upon a plea to the jurisdiction, and in the opinion of the Court the Honorable Judge stated "under the code of this State (Ark.) there is no difference in the method of pleading matter in abatement and matter in bar. Pleas in abatement are abolished, and where a want of jurisdiction over the person or subject of the action is not disclosed upon the face of the complaint the objection may be taken by answer."

By the code of Kansas (G. S., 1889, Sec. 4100) it is provided:

"If any action be commenced within due time and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits and the time limited for the same shall have expired, the plaintiff, or if he die, and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

And by Section 4227 of such Code it is provided that "Either party may be allowed, on notice and on such terms as to costs as the Court may prescribe, to file a supplemental petition, answer or reply alleging facts material to the case, occurring after the former petition, answer or reply."

Such Code also provides: "Section 4169. The only pleadings allowed, are: First, the petition by the

plaintiff; Second, the answer or demurrer by the defendant; Third, the demurrer or reply by the plaintiff; Fourth, the demurrer by the defendant to the reply of the plaintiff."

It is therefore clear that pleas in abatement are unknown to the proceedings in the courts of record of the State of Kansas, and that the extension of time for one year after the decision of the cause "otherwise than upon its merits" is intended to take the place of an abatement; and such is the uniform practice in the Courts of that State.

In the cases upon "arbitration" cited under the third point of this brief, abatement of the several suits was not suggested but the cases were tried and determined upon their merits upon the failure or waiver of arbitration, and in no instance was it held that the failure to arbitrate only abated the cause.

Such decision of the Honorable Circuit Court of Appeals conflicts with the decisions of other Federal Courts in—

Ins. Co. vs. Williams, Dist. Mo., 3 Biss., 370.

Bracken vs. Union P. R. R. Co., (C. C. A., 8 Cir.) 56 Fed., 447.

Citizens' Bank vs. Farwell, (C. C. A., 8 Cir.) 56 Fed., 570.

Bank N. A. vs. Rindge, (C. C. S. D., Cal.) 57 Fed., 279.

The cause was tried upon the pleadings as fully presenting the defense made, and the cause should have been disposed of in the Court of Appeals, upon the same view of such pleadings.

Third.—The Honorable Circuit Court erred in holding that arbitration fixing the amount of the claim was not a condition precedent to the right of action, as stated in its opinion, second clause, page 44 of record.

The argument of that Court that if such clause "is to be taken literally, then all the Insurance Company has to do to escape liability altogether is to refuse to appoint an arbitrator, and thus make it impossible for the insured to comply with this condition," is without weight under the long established rule that, "no man can take advantage of his own wrong," and the repeated decisions holding that if the insurer has prevented or unduly delayed arbitration it can not rely upon that provision of the policy as a defense.

Uhrig vs. Ins. Co., 101 N. Y., 362 at 365.

Powers vs. Dry Goods Ins. Co., 48 Minn., 380.

Zimiriski vs. Ins. Co., 91 Mich., 600.

The same rule was stated by this Court as to delay in bringing suit caused by the conduct of the Insurance Company in Thompson vs. Phenix Ins. Co., 136 U. S., 287.

The cases cited by the Circuit Court of Appeals in support of its opinion upon this proposition are not in point. Every case so cited (except Randall vs. Ins. Co.,

25 Pac. Rep., 960) involved the construction of a policy in which arbitration was necessary only "at the request of either party," and was not a condition precedent unless so demanded. The authorities are uniform that in such case demand is necessary to the right to arbitration, without which failure to arbitrate is not a bar to the action.

The rule is stated by Circuit Court Judge McCrary, in Wallace vs. Ger. Am. Ins. Co., 4 McCrary, 123 at 125, "the condition did not absolutely require an arbitration; it only authorized either party to require it by request in writing. The inference is reasonable that if neither party requested it in writing the usual remedies by suit were to remain."

This question was not involved in the case of Randall vs. Ins. Co., 25 Pac. Rep., 960. An examination of the record in that case (page 3) shows that demand for and arbitration therein was alleged in the complaint and also that appraisement was made by the parties agreed upon by the plaintiff and Company, which (page 6) was denied in the answer, and the Court found (page 14) that the two persons alleged to have been named as arbitrators, and the value which such two persons should agree upon, were consented to by plaintiff and defendant and they agreed that it would be satisfactory. There was therefore "no difference between the parties as to loss or damage," and such question was not therefore properly before the Court and not necessary to the determination of any question involved in such case. That arbitration as to the amount of loss

in case of difference is a condition precedent to action when so agreed upon by the parties, and without which an action cannot be maintained, and also that demand by the insurer for arbitration is only necessary when so stated in the policy, is the rule of law as stated in an almost uniform line of decisions since the case of Scott vs. Avery, 5 H. L. Cas., 811, as shown by authorities cited in Hamilton vs. Ins. Co., 136, U. S., 242.

Myer's Federal Decisions, page 1036, section 72.

Gauche vs. Ins. Co. (E. Dist. La.) 4 Woods, 102.

S. C., 10 Fed., 247.

Lovejoy vs. Ins. Co. (N. Dist. Ills.) 11 Ins., L. J., 186 at 192.

Yoemans vs. Ins. Co. (Dist. N. J.) 5 Ins., L. J., 858.

Crossley vs. Ins. Co. (Dist. Mass.) 27 Fed., 30.

Trott vs. Ins. Co. (Dist. ———) 1 Cliff. 439.

Summerfield vs. Ins. Co. (Dist. Va.) 24 Ins., L. J., 442.

S. C., 62 Fed., 249.

Ins. Co. vs. Alvord (C. C. A. 1st Cir.) 23 Ins., L. J., 752–801.

S. C., 61 Fed., 752.
(Opinion by Colt, Circuit Judge.)

Ins. Co. vs. Hamilton (C. C. A., 6th Cir.) 59 Fed., 258 at 263.
(Opinion by Severens, Judge.)

In such two cases the learned judges cite the opinion of this Honorable Court in Hamilton vs. Insurance Co., 136 U. S., 242, as supporting the principle stated, as did the learned Judge before whom this case was tried. The rule that, when so provided in the contract, the amount of loss or damage shall be determined by arbitrators and that the appraisal thereof shall be a condition precedent to action, is valid in law, has been approved by the courts of last resort in the following States:

California—Old Saucileto vs. Com. Ins. Co., 66 Cal., 253, and several later cases.

Illinois—Ins. Co. vs. Pulver, 126 Ill., 329.

" Steiger vs. Ins. Co., 109 Ill., 254.

Florida—Hanover Ins. Co. vs. Lewis, 28 Fla., 209.

S. C., 18 Ins., L. J., 17.

Georgia—L. & L. & G. Co. vs. Creighton, 51 Ga., 95.

Kansas—Berry vs. Carter, 19 Kas., 135.

" Insurance Co. vs. Wilson, 45 Kas., 250.

" Insurance Co. vs. Hall., 41 Pack., 65. The last decision was rendered July 6, 1895.

Massachusetts—Reed vs. Ins. Co., 138 Mass., 57.

S. C., 14 Ins., L. J., 465.

Massachusetts—Hutchinson vs. L. & L. & G. Co., 153 Mass., 143.

S. C., 20 Ins., L. J., 273.

Michigan—Chippeway, etc. Co. vs. Ins. Co., 80 Mich., 116.

Minnesota—Gasser vs. Ins. Co. 42 Minn., 315.

" Mosness vs. Ins. Co., 52 N. W., 932.

Missouri—Zallee vs. Ins. Co., 44 Mo., 531.

North Carolina—Pioneer Co. vs. Ins. Co. 106 N. C. 28.

New Jersey—Ins. Co. vs. Wolff, 50 N. J. Law, 453.

Pennsylvania—Flagarty vs. Ins, Co. 7 Ins. L. J. 630.

Texas—Scottish etc. Co. vs. Clancy, 71 Tex., 5-8 S. W. R., 630.

Wisconsin—Chandos vs. Ins. Co., 54 N. W. R., 390.

S. C., 84 Wis., 184.

In the most of which cases the rule claimed is positively stated and in the others impliedly approved.

In such of the cases as have been decided since the case of Hamilton vs. Ins. Co., 136 U. S., the opinion of this Honorable Court in that case has been cited as supporting this principle and notably so in the cases decided in the different Federal Circuit Courts and in the Circuit Court of Appeals of the First and Sixth Circuits,

as also the learned Judge before whom this cause was tried, as stated in his opinion upon the motion for a new trial (Record, page 29). And strangely, the same case is cited by the Court of Appeals in reversing this cause, but as supporting the contrary rule.

The Honorable Court of Appeals in the closing paragraph of its opinion (Record, page 47), lays particular stress upon the remark made by defendant's agent at the time of the attempted settlement, when such agent offered to pay the amount of defendant's liability as computed from the information given by the plaintiffs, to the effect that, "We'll beat you before a farmers' jury in your own courts," as having invited a suit at law.

By the terms of the policy it was agreed that the amount of loss or damage should be submitted to arbitrators, "*but shall not determine the validity of the contract nor the liability of this Company nor any other question except only the amount of such loss or damage.*" Under such contract the Company had the right to offer to pay the amount actually due under its policy. It had the right to stand upon its contract, and when plaintiffs demanded the full amount of the insurance, notwithstanding their statements that the actual loss was greatly less, they demanded and insisted upon their right to prosecute their action, and their claim of the right to litigate the case was properly met by such statement of defendant's agent.

This assumption that arbitration was declined in advance is not sustained by the record. There was a

direct and positive offer to pay $22,700 as the amount of the loss, based upon the estimates stated by the insured; and the defendant company offered to pay its full proportion thereof, which proportion was stated in the policy. The plaintiff thereon demanded the full insurance, claiming $45,000, and refused to take less. Plaintiffs could have accepted the offer and forthwith brought suit upon such promise to pay. The defendant's agent rightly assumed that they could "beat" such claim of the plaintiffs before a jury under such circumstances upon the admission made by the plaintiffs as to purchases, sales, profits and discounts.

There was no claim made by the plaintiff during the pendency of the action, or on the trial, that defendant had waived any of its rights under the contract and the question was presented for the first time in the brief of plaintiffs in error.

Should it be suggested that the denial of liability was inconsistent with the defense of failure to arbitrate, we beg to suggest that no such claim was made upon the trial nor any claim or allegation of waiver of arbitration made in either the petition or reply. This denial of liability, implied from the charge that plaintiffs had burned the insured property, was first stated by defendant in its answer. It had before that offered to pay all the property was worth as estimated from data given by the plaintiffs, and when suit was commenced in the State Court the defendant had a perfect legal right, under the state practice, to make and state as many grounds of defense as existed in its favor. The Civil

Procedure Code of Kansas provides: "G. S. 1889, par. 4177 (after stating the defenses which may be made). The defendant may set forth in his answer, as many grounds of defense, counter claim, set off and for relief as he may have whether they be such as have been heretofore denominated, legal or equitable, or both."

This code was adopted from Ohio, and the Supreme Court of that State discussed this question in the case of the Farmers Ins. Co. vs. Frick, 29 O. S., 466, in which the Court says—

"The defendant had a right to set forth in its answer as many consistent grounds of defense as it has. If the plaintiff below had failed to make and furnish the defendant below with the preliminary proofs of loss, in the manner and in the time required by the policy, such failure constituted a defense to the action. * * By going to trial on other grounds of defense set up in the answer as well as upon the ground of want of preliminary proof of loss, the defendant did not waive its right to insist upon the want of such proof as a defense, there being no inconsistency between the defenses."

To like effect is, Ins. Co. vs. Lindsey, 26 O. S., 348; also, Beatty vs. Ins. Co., 66 Pa. St., 9.

Upon this point the trial Judge, who was for many years a leading attorney engaged in active practice, and fully informed as to the Kansas Code of Procedure, in the opinion on motion for a new trial, stated—

"This denial of liability in toto appears for the first time in the answer of the defendant in this suit. Up to the time the Company had offered to pay its proportion of what it claimed was the actual loss of the insured, but there was an irreconcilable difference between the parties

as to the amount of that loss, thus bringing the case within the provisions of the arbitration clause of the policy. Inasmuch as the arbitration should precede any suit, at no time during the period for arbitration did the Company deny its liability for the loss. That the Company has set up in one count of its answer a denial of any liability does not affect the case. It might waive any objection to the cause of the fire, and offer to settle to avoid litigation, but this would not affect its right when sued to set up in its answer any legal defense it had to the action."

The same rule is stated by the Supreme Court of Minnesota in Johnson vs. Ins. Co., 41 Minn., 396.

Plaintiffs did not in their petition allege any waiver of the arbitration clause by denial of liability or otherwise, but in their reply denied the allegations of defendant's answer.

A party cannot be allowed to reply on the allegations found in his adversary's pleadings to make out his cause of action or defense, and at the same time put such allegations in issue by denials.

The plaintiffs stated their cause of action in their petition, alleging full performance of the conditions of the policy, and will not be allowed to depart from the case made in their petition and reaffirmed in their reply, and recover upon a waver which was not relied upon or made in their pleadings.

Ins. Co. vs. Thorp, 48 Kas., 239 at 243.

Mosness vs. Ins. Co., 52 N. W., 932.

In this case the plaintiffs relied upon and alleged

full performance of the conditions of the contract and they cannot be heard to say that they now rely upon a waiver of such conditions and so recover.

In view of the decision of this Honorable Court in Hamilton vs. Ins. Co., *supra*, and the authority thereof as weighed and considered by the different Federal Courts in the cases cited, and by the learned Judge before whom this cause was tried, and also by the Appellate Courts of many states, and also as construed and cited in the Digests of such decision, and the contrary construction thereof as given by the Honorable Circuit Court of Appeals, the case is clearly brought within paragraph 6 of the Appellate Courts Act and forcibly presents the necessity of a construction of such a clause in a policy and a final determination of the meaning and effect of the decision of this Honorable Court in Hamilton vs. Insurance Co. Without the granting of the Writ of Certiorari and the review of the decision of the Court of Appeals, and a final determination of the question presented, such question must stand as affirmed and denied by Federal Courts of equal jurisdiction, and such contrary and conflicting decisions citing and relying upon such decision as supporting them.

We respectfully submit that in view of the conflict of the decision of the Court of Appeals in this case with the great weight of authority, including the decisions of otner Federal Courts, Courts of Appeals and Circuit Courts, all citing and replying upon such decisions of this Honorable Court as supporting their respective and con-

flicting decisions, the review of such decision is essential to the consistency and harmony of the decisions of the Federal Courts upon the question involved.

All of which is respectfully submitted.

HORACE M. JACKSON,
Attorney for Defendant in Error and Petitioner.

HENRY ELLISTON,
Of Counsel for Defendant in Error and Petitioner.

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

MAY TERM, 1894.

No. 388.

A. B. KAHNWEILER AND BROTHER, PLAINTIFFS IN ERROR,

vs.

THE PHŒNIX INSURANCE COMPANY, OF BROOKLYN, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED DECEMBER 30, 1893.

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Caption to Transcript ..... a
Transcript from U. S. Cir. Court, Dist. of Kansas 1
Citation and Acceptance of Service 1
Writ of Error and Clerk's Return 1
Transcript from District Court of Douglas County, Kansas 3
Exhibit A (Policy of Insurance) 3
Petition 12
Præcipe for Summons 14
Certificate of Service of Summons 15
Demurrer to Petition 16
Petition for Removal to Federal Court 17
Bond on Removal 18
Order of Removal 20
Clerk's Certificate to Transcript 20
Order Overruling Demurrer to Petition 21
Answer 21

Reply 22
Jury Impaneled; Trial January 2, 1889 23
Defendant's Demurrer to Evidence 23
Order Sustaining Demurrer to Evidence 24
Motion for New Trial 25
Order, Motion for New Trial Submitted 26
Opinion of the Court on Motion for New Trial 26
Judgment 29
Bill of Exceptions 30
Testimony for Plaintiffs 30
A. B. Kahnweiler 30
Demurrer to Evidence 33
Certificate of Judge to Bill of Exceptions 33
Petition for and Order allowing Writ of Error 34
Assignment of Errors 34
Bond on Writ of Error 35
Clerk's Certificate to Transcript 36
Appearance for Plaintiffs in Error 37
Appearance for Defendant in Error 37
Appearance of Clifford Histed for Plaintiffs in Error 38
Order of Submission 38
Opinion of U. S. Circuit Court of Appeals 40
Judgment 48
Application for Leave to Present Petition for Rehearing 48
Order Granting Leave to File Petition for Rehearing 50
Petition for Rehearing 51
Order Denying Petition for Rehearing 70
Clerk's Certificate to Transcript 71

PLEAS AND PROCEEDINGS in the United States Circuit Court of Appeals for the Eighth Circuit at the December term, 1894, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit, the third day of December, A. D. 1894, before the Honorable Henry C. Caldwell, the Honorable Walter H. Sanborn and the Honorable Amos M. Thayer, Circuit Judges.

Attest:

(Seal.)

JOHN D. JORDON,
Clerk U. S. Circuit Court
of Appeals Eighth Circuit.

BE IT REMEMBERED, that heretofore, to-wit; on the thirtieth day of December, A. D. 1893, a transcript of record in pursuance to a writ of error directed to the Circuit Court of the United States for the District of Kansas was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in the case of A. B. Kahnweiler & Brother, Plaintiffs in Error, vs. The Phenix Insurance Company of Brooklyn, Defendant in Error, which said transcript of record is in the words and figures following, to-wit:

1 The United States of America to the Phenix Insurance Company of Brooklyn, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein A. B. Kahnweiler & Brother are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable C. G. Foster, Judge of the Circuit Court of the United States for the District of Kansas, this eleventh day of November, in the year of our Lord one thousand eight hundred and ninety-three.

C. G. FOSTER,
United States District Judge,
for the District of Kansas.

Service of the above citation accepted November 16th, 1893.

THE PHENIX INSURANCE COMPANY,
By H. M. JACKSON, *Attorney.*

No. 6088. United States Circuit Court, First Division of the Judicial District of Kansas. A. B. Kahnweiler & Bro. vs. The Phœnix Insurance Co. of Brooklyn. Citation. Filed Nov. 11, 1893. Geo. F. Sharitt, Clerk.

2 UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas — greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the June term, 1893, thereof, between A. B. Kahnweiler & Brother, plaintiffs, and The Phenix Insurance

Company of Brooklyn, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, A. B. Kahnweiler & Brother, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 10th day of January, 1894, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eleventh day of November in the year of our Lord one thousand eight hundred and ninety-three.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Issued at office in the City of Topeka, with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by:

C. G. FOSTER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
FIRST DIVISION OF THE
JUDICIAL DISTRICT OF KANSAS. } ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and

preceedings in the within-entitled case, with all things concerning the same.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In witness whereof, I hereto subscribe my name and affix the seal of said Circuit Court, at office in the City of Topeka, this 18th day of December, A. D. 1893.

GEO. F. SHARITT,
Clerk of said Court.

No. 6088. United States Circuit Court, First Division of the Judicial District of Kansas. A. B. Kahnweiler & Brother vs. The Phenix Insurance Company of Brooklyn. Writ of Error. To the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 11" day of Nov., 1893.
Geo. F. Sharitt, Clerk.

3 Be it remembered, that on the 13th day of August, A. D. 1887, A. B. Kahnweiler and S. B. Kahnweiler, partners as A. B. Kahnweiler & Bro., as plaintiffs, commenced an action in the District Court of Douglas County, State of Kansas, against the Phenix Insurance Company of Brooklyn, defendant, by filing in said court their said petition against said defendant, which said petition is copied in words and figures as follows, to wit:

Exhibit A.

No. 1017 $2500

By this Policy of Insurance the Phenix Insurance Company of Brooklyn, N. Y.

(Phenix Insurance Co. Brooklyn, N. Y.)

In consideration of the conditions, limitations and requirements of this policy hereinafter mentioned, and of the receipt by said company of twenty-seven 50\100 dollars will indemnify A. B. Kahnweiler & Bro. against loss or damage by fire, to the following specified and located property only, to an amount not exceeding the actual cash value of the property herein described, at the time of such loss, and in no event to exceed twenty-five hundred dollars,

Upon their stock of staple and fancy dry goods, notions and merchandise of like hazard, contained in the two-story brick and stone metal-roof building with one-story stone metal-roof extension, situate and known as No. 169 Massachusetts Street, Lawrence, Kansas. $40,000 total concurrent insurance permitted.

Indrsement Aug, 7th, 1886. Permission is hereby granted to make an opening in the south wall of the within-described

building, and this policy made to also cover on same property in the two-story brick and stone metal-roof building known as No. 171 Massachusetts Street (old number). Gleason & Whitman.

And the said Phenix Insurance Company hereby agrees
4 to make good unto the said assured, their executors, administrators and assigns all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified from the seventh day of April, one thousand eight hundred and eighty-six, at 12 o'clock at noon, to the seventh day of April, one thousand eight hundred and eighty-seven at 12 o'clock o'clock at noon; the amount of loss or damage to be estimated according to the actual cash market value of the property at the time of the loss, and to be paid sixty days after the proofs of the same required by the company shall have been made by the assured, and received at the office in Chicago, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy, or unless the company shall have given notice of their intention to replace, rebuild or repair the property damaged or destroyed.

1. If an application, survey, plan or description of the property herein described is taken, whether taken or signed subsequent or prior to the issue of this policy, it shall be considered a part of this contract, and a warantee by the assured. Any false representation by the assured of the condition, situation or occupancy of the property, or any omission to state fully all facts or circumstances in regard to the risk, or any over-valuation or any misrepresentation whatever; or if the assured shall have, or shall hereafter make any other insurance (whether valid or not) on the property herein described, or any part thereof without the consent of this company written hereon; or if the hazard be changed by occupancy or by the erection or occupation of neighboring buildings, or by any means whatever without the consent of this company indorsed hereon; or if it be a manufacturing establishment running in whole or in part over-
time or running at night or if it shall cease to be oper-
5 ated, without special agreement indorsed on this policy; then, and in every such case this policy shall be void. If the property be sold or transferred (in whole or in part) or upon the commencement of foreclosure proceedings against; or a sale under a deed of trust; or the existence of a judgment lien upon; or the issue or levy of an execution against any kind of property herein described; or if the property be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, except in case of succession by reason of

the death of the assured, whether by legal process, or judicial decree, or voluntary transfer, assignment or conveyance; or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon, this policy shall in each and every instance be void. If the assured shall keep only waste, gunpowder, fireworks, nitroglycerine, phosphorus, saltpetre, nitrate of soda, petroleum or any of its products, nap-tha, gasoline, benzine, benzole or benzine varnish or keep or use camphene, gasoline or any spirit gas, or any burning fluid, chemical oils or rubber cement, without written permission in this policy; then, and in every such case, this policy is void. If the property insured by this policy, or any contiguous or exposing property, shall be on fire at the time this contract for insurance is made and entered into, and the fact of such fire is not made known to this company, then there shall be no liability whatever under this policy for any loss or damage resulting from such fire or fires, whether such loss or damage be immediate or remote.

2. This insurance does not apply to or cover jewels, plate watches, musical or scientific instruments, ornaments, metals, patterns, music, printed books, engravings, printers', and engravers' cuts (wood or metal), paintings, picture frames, sculpture, casts, models, curiosities, signs, awnings unless particularly specified in this policy, and then not for an amount exceeding the actual cost of same.

This company shall not be liable by virtue of this policy or any renewal thereof, until the premium therefor be actually paid; nor for any loss by theft or after a fire, of which the burden or proof shall be on the assured; nor for money or bullion, bills, notes, accounts, deeds, evidence of debt, or securities of property of any kind; nor for any loss or damage by fire which may happen by means of or during an invasion, insurrection, riot, revolt, civil commotion, or military or usurped power;

(Note—By the words "riot, revolt, and civil commotion," it is understood to mean when two or more persons engage in riotous or unlawful proceedings, or are found resisting the legally constituted authorities;) nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor by ligthtning, unless specifically mentioned; nor for any loss caused by the bursting of a boiler, or by explosion from any cause, unless fire ensues, and then only for the loss or damage by fire; nor shall this company be liable for any loss under this policy occasioned by the gross negligence of the assured.

3. If a building shall fall, or any part thereof, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be other than an absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if the building insured, or containing the property insured by this policy, stands on leased grounds, or if there be a mortgage or other incumberance thereon it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void. When the property shall
7 be sold or encumbered, or otherwise disposed of, written notice shall be given to the company of such sale or encumberance or disposal, and its assent thereto endorsed hereon, otherwise this insurance on said property shall immediately terminate.

5. If during this insurance, the above-mentioned premises shall become vacant or unoccupied, or if the occupation of such premises be changed, except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall continue vacant or unoccupied, or shall be so appropriated, applied or used, this policy shall cease and be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire; and in case of failure to do so this company will not be liable for damage caused by such failure; and there can be no abandonment to the company of the property insured.

It is understood and agreed that agents of this company have no authority in any manner, or by any act or omission whatsoever, either before or after making this contract, to waive, alter, modify, strike from this policy, or otherwise to change any of its conditions or restrictions, except by distinct, specific agreement, clearly expressed and indorsed hereupon and signed by the agent making it. Nor shall silence upon receipt of notice of breach of any condition or restrictions herein, or failure to declare this policy forfeited thereby, or the issuance of any renewal or new policy, or the acceptance of any premium or other money, or any other act or omission whatsoever by any agent of this company, whether with or without knowledge of such breach, or whether before or after making of this contract, work any waiver of such conditions or restrictions, or effect any estoppel against this com-
8 pany or deprive it of any forfeiture or defense either in law or in equity to an action upon this policy.

7. In case any other insurance upon the property herein described, whether made prior or subsequent to the date of this policy (whether valid or not) the assured shall be entitled to recover from this company no greater portion of the loss sustained that the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating, blanket or general policy or policies, attaching in whole or in part, to the property covered by this policy, shall, as between the assured and this company, be considered as contributing insurance for the full amount of such policy or policies, and liable as such to pay pro rata any loss, total or partial, on the property herein described.

Re-insurance for any other insurance company shall be on the basis of joint liability, and in the event of loss, this company shall only pay its proportion of the loss sustained by the reinsured company under its policy.

When property covered by this policy is damaged by removal from a building not destroyed but exposed to loss by fire, such damage shall be borne by the insurers and insured in such proportion as the whole sum insured bears to the whole value of the property covered, of which proof, in due form required by this policy, shall be made by the claimant so insured.

8. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect and refunding a rateable proportion of the premium for the unexpired term of the policy it is a part of this con-
9 tract than any person other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstance whatever, or in any transaction relating to this insurance.

9. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter, render a particular and specific account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the property covered by this policy, giving copies of the written portion of all policies thereon, also the actual cash value of the property, and their interest therein, for what purpose and by whom the

building insured or containing the property insured, and the several parts thereof, were used at the time of the loss; when and how the fire originated and shall produce a certificate under the hand and seal of a magistrate or notary public, nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured and verily believes that the assured has, without fraud, sustained loss on the property described to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath, by any person appointed by the company, either before or after rendering of the particular and specific account of loss as heretofore provided and subscribe to such examinations when reduced to writing and shall also produce their books of account, bills, invoices, or other vouchers, and exhibit the same for examination at the office of this company, and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy damaged or not damaged, for examination, to any person or persons named by this company, and as a part of the preliminary proofs of loss, the assured shall, if the claim shall be for building destroyed or damaged by fire, procure the duly verified certificate of some reliable and responsible builder, in detail as to the actual cash value of such building immediately before said fire, which shall be attached to, and form a part of, such proofs, and if requested so to do, furnish the company with plans and specifications of the buildings destroyed or damaged, which shall be duly verified by the oath of the assured, which said plans and specifications shall be conclusive as against the assured as to plan and description of the property described.

When personal property is damaged, the assured shall forthwith cause it to be put in order assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company, of the whole naming the quantity, quality and cost of each article.

10. The amount of sound value and of damage to the property whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured, or failing to agree, the same shall then be submitted to competent and impartial arbiters, one to be selected by each party, the two so chosen, in case of dis-

agreement, to select an umpire to whom they shall refer each subject of difference, and the award of any two of them, in writing under oath shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this company, nor any other question except only the amount of such loss or damage. Each party shall pay their own arbitrator and
11 one-half of the cost of the umpire. It shall be optional with the company to take the whole, or any part of the articles at their appraised value; and further that it shall be optional with this company to repair, to rebuild or replace the property lost or damaged with like kind of quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required; and until such proofs, plans and specifications, declarations and certificates are produced by the claimant, and such examinations and arbitrations permitted and had the loss shall not be payable.

In case of loss on property held in trust, or on commission, or if the interest of the assured by other than the entire and sole ownership, the names of the respective owners and mortgagees shall be set forth, together with their respective interests therein.

Note. By "property held in trust" is intended property held under a deed of trust, or under the appointment of a court of law, or property held as collateral security; in which latter case this company shall be liable only to the extent of the interest of the assured in such property.

In the event of partially non-current insurance, then to determine the liability of this company, it shall be assumed that policies other than specific shall contribute with specific policies in the proportion that the loss on the property, included in each item of these specific policies bears to total loss, for which the more general policies are liable.

If this policy is made payable, in case of loss, to a third party or held as collateral security, the proofs of loss shall be made by the party originally insured unless there has been an actual sale of the property covered, consented to as required by the conditions of this policy. All fraud or attempt
12 at fraud, by false swearing or otherwise, shall forfeit all claim on this company, and shall be a complete bar to any recovery for any loss under this policy.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in the event

of any claim for loss being made under this policy on the stock of any manufacturing establishment, the measure of damage shall in no case exceed the actual cost of producing the same; and in case of the depreciation of such property from use or otherwise, a suitable deduction from the cost of replacing shall be made, to ascertain the actual cash value at the time of the fire.

11. This insurance (the risk not being changed) may be continued for such further times as shall be agreed on, provided premium therefor is paid and receipt given for the same, with the signature of the president or secretary, and countersigned by the regularly commissioned agent of the company named thereon, and it shall be considered as continued under the original representations and for the original amounts and divisions unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings at the time of renewal, the renewal shall be void.

Whenever this policy may have become void from any cause it shall not be revived or reinstated by the issue of any renewal certificate or receipt, or in any other way, except by special contract for such reinstatement in writing hereon.

12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, which is agreed to be a condi-
13 tion precedent, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

There shall be no liability for loss on any personal property insured under this policy except while contained in the building or buildings herein described.

Kerosene oil may be used for lights in dwellings, stores, churches and school houses, and kept for sale in stores, in quantities not exceeding five barrels, and not to be handled or drawn within fifteen feet of artificial light.

Steam Power Threshers.—The use of steam power for threshing grain or pressing hay, without consent of the company indorsed hereon, will avoid this policy.

Gas.—The generating or evaporating within the building or contiguous thereto of any substance for a burning gas, or the use of gasoline for lighting, will avoid this policy, unless permitted in writing hereon.

Fences, sidewalks and other yard fixtures, also furniture and fixtures, including elevators, contained in any buildings are not insured under the within policy, unless separately and specifically mentioned. Plate glass in doors and windows when of the dimensions of nine square feet or more, and pier or mantel glasses or mirrors, are not covered by insurance on the building, but must be separately and specifically insured. Frescoed work or gilding on walls or ceilings is not covered by insurance on the building but must be separately and specifically insured. Goods in show windows where lights are used must be separately and specifically insured, otherwise
14 they are not covered by this policy.

Builders' Risk.—The working of carpenters, roofers, tinsmiths, gasfitters, plumbers and other mechanics, in building, altering or repairing the premises named in this policy, will avoid the same, unless permission for such work be indorsed in writing hereon, except in dwelling houses only, where five days are allowed in any one year for incidental repairs, without notice or indorsement.

It is hereby understood and agreed, by and between this company and the assured, that this policy is made with reference to the foregoing terms and conditions.

In witness whereof, The Phenix Insurance Company, have caused these presents to be signed by their president and attested by their secretary in the City of Brooklyn, County of Kings, N. Y., but the same shall not be binding until countersigned by Gleason & Whitman, agents for the company at Lawrence, Kansas.

STEPHEN CROWELL, *President.*
GLEASON & WHITMAN, *Agents.*

PHILANDER SHAW, *Secretary.*

Countersigned at Lawrence this 7th day of Apr., 1886.

15 CLASSES OF HAZARDS.

This Classification Refers to Buildings and their Contents, First Class.

Not Hazardous.—Dwelling houses and household furniture in dwelling houses, staple, foreign and domestic dry goods in packages.

Hazardous.—Agricultural implements, belting and car springs of india rubber or gutta percha; boots and shoes; card printing; china or earthenware or glassware in boxes, crates or casks; copper and sheet-iron ware; dry goods including cotton bats and wadding; embroideries and laces; flour; furs and peltries in packages; glass, window or plate or looking glasses in boxes; grocers' stock; gum shellac; gutta percha and india rubber manufactured; hides and leather; hops in bales; indigo; ironware; metals in bars, rods, pigs and sheets; oil, fish and vegetable; paints, paper in reams; pot pearl and soda ash; provisions; rice; straw braid and straw hats in packages as imported; sail making; spiritous liquors in casks and in glasses, in packages; sugar; sulphur; threshed grain; tailors' goods and ready made clothing; tallow; whale-bone; wine in casks and in glass in packages; wool.

Extra Hazardous.—Alcohol in bbls.; apothecaries' stocks (retail only); artificial flowers and feathers; basket sellers' stocks; bakeries with ovens outside the building and using coal; basket bleaching; basket making; blacksmiths' shops; block and pump making; box repairing; workshops; brass turning and working, also stocks of books, china or earthenware or glassware, or lookingglasses with privilege of packing and unpacking; coffee; colormen's stock; china or glass, or earthenware or window or plate glass or lookingglasses unpacked; cabinet ware; confectionery; carriages; carving; chocolate making; coopering; copperplate; printing; drugs, importers' stock of, without inflammable acids or phosphorus; daguerreotype materials; daguerreotyping; essential oils; eating houses; electro-plating; firecrackers in packages; flax; flocks; fishing tackle; furs, unpacked; feathers; fringe-making by hand power; gum copal; gas fixtures; gas fitting; gilding; gold pen making; gun repairing; hay and straw pressed in bundles; hardware and cutlery; hat ironing; hat bleaching; hemp; india rubber and gutta percha goods; india rubber hard goods; jewelry; jewelry manufacturing; lime unslacked in lime stores; liquors and wine in glass unpacked; lamps; lamp manufacturing; liquor bottling establishments; lithographing; matches; stocks of, on sale, musical instruments and printed music; millinery; military goods; map mounting and varnishing; morrocco manufacturing; manilla and sisal glass and tow; oakum in bales; oiled clothing; optical and mathematical instruments; printers' stock; pitch; pins and needles; paper hangings; porter houses, percussion caps, pictures and prints, precious stones, paper boxes and band boxes; perfumery; pocket books; plumbing and pewtering; printing of newspapers and engravings by hand only; provision warehouses with brick smokehouses attached; photographing; private stables; rags

in packages; rosin and rison oil; ship chandlery; spirits of turpentine; salt; spices; silver plate and plated ware; straw goods; segars in stores and manufactories; stationery; silversmithing; teas; tar; toys; tin or sheet iron or copper working; taverns; tobacco; umbrella manufacturing; upholstery; varnish; (excepting nap-tha or benzine varnish); vessels in port, their cargoes and vessels building and repairing; wood and willow ware; watches; watchmakers' tools.

Specially Hazardous.—Cotton in bales; cotton brokers' samples and all trades, occupations and hazards not above enumerated, are classed specially hazardous.

Dry goods in windows where lights are used are not covered by this policy unless a specific amount is stated to apply thereto.

17 District Court, County of Douglas.

Petition.

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & BRO., Plaintiffs,

vs.

THE PHENIX INSURANCE CO. of Brooklyn, Defendant.

The plaintiffs above named for cause of action against the above-named defendant shows to this Court:

1. That the defendant is a corporation duly created by and under the laws of the State of New York, and is duly authorized to do and transact the business of insurance within the State of Kansas.

2. That said plaintiffs were the owners of a general stock of staple and fancy goods, millinery goods, cloaks, notions, toilet goods, and other merchandise kept and contained in their store at Nos. 925 and 927 (old Nos. 169 and 171) Massachusetts Street, in the City of Lawrence, Kansas, at the time of their insurance and destruction by fire as hereinafter mentioned.

3. That on or about the 7th day of April, A. D. 1886, at the City of Lawrence in said County of Douglas, and State of Kansas, in consideration of the payment by plaintiffs to the defendant of the premium of twenty-seven dollars and fifty cents ($27.50) the defendant, by its agents, duly authorized thereto, made its policy of insurance in writing, and did thereby insure the said plaintiffs against loss or damage by fire on said merchandise described in said policy to the amount of twenty-five hundred dollars ($2500.00) a copy of which said policy is hereto annexed marked Exhibit "A" and made a part of this petition.

4. That on or about the 8th day of January, 1887,
18 said stock of goods, merchandise and personal property described in and covered by said policy were totally destroyed by fire, and the plaintiffs' loss thereby was forty-nine thousand four hundred and twenty-four dollars and forty-six cents $49,424.46).

5. That immediately thereafter the plaintiffs gave defendant due and legal notice of said loss in writing, and furnished said defendant with proof of their said loss, and interest, and otherwise performed all the conditions of the said policy on their part.

6. That the defendant has not paid the said loss, but is now owing the plaintiffs therefor the sum of twenty-five hundred dollars, with interest thereon from May 1st, A. D. 1887.

Wherefore, plaintiffs pray judgment against said defendant for said sum of twenty-five hundred dollars, with interest thereon from May 1st, A. D. 1887, and costs of this action.

JOHN HUTCHINGS,
Atty. for Plaintiffs.

District Court, County of Douglas.

Precipe.

A. B. KAHNWEILER & BRO., Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

To the Clerk—Please issue summons on foregoing petition against the defendant therein named, directed to the "Superintendent of Insurance," returnable according to law. If defendant fails to answer, plaintiffs will take judgment for the sum of ($2500) and interest thereon from May 1st, 1887, and costs.

JOHN HUTCHINGS,
Atty. for Plaintiffs.

19 Indorsed. No. 6032. District Court, Douglas County. A. B. Kahnweiler & Bro. vs. the Phenix Insurance Company. Petition. John Hutchings, Atty. for Plffs. Filed Aug. 13th, 1887. J. L. Bristow, Clerk.

STATE OF KANSAS, } ss.
COUNTY OF DOUGLAS. }

I, J. L. Bristow, Clerk of the District Court, sitting in and for said County and State, do hereby certify that the above and foregoing is a true, correct and complete copy of the origi-

nal petition in case No. 6032 A. B. Kahnweiler vs. The Phenix Insurance Co., of Brooklyn as the same now appears of record and on file in my office.

Witness my hand and the seal of said court, affixed at my office in the City of Lawrence, this 27th day of Aug., 1887.

J. L. BRISTOW, *Clerk.*

By....., *Deputy.*

And thereon summons was issued by the Clerk of said court on said 13th day of August, A. D. 1887, directed to the Superintendent of Insurance of the State of Kansas, and which said summons together with the indorsements thereon is copied as follows, to wit:

Indorsed. Kahnweiler & Bro. vs. Phenix Ins. Co. of Brooklyn. Copy of Petition.

20 State of Kansas. Insurance Department.

I, D. W. Wilder, Superintendent of Insurance for the State of Kansas, do hereby certify that the annexed is a true copy of a summons received by me on the 15th day of August, A. D. 1887, at 9 o'clock A. M., in case of

A. B. KAHNWEILER & BRO.

versus

THE PHENIX INSURANCE CO. OF BROOKLYN.

Issued by the Clerk of the District Court of Douglas County, Kansas, dated the 13 day of Aug., A. D. 1887.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the City of Topeka, this 15th day of August, A. D. 1887.

[SEAL] D. W. WILDER,
Superintendent.

STATE OF KANSAS, } ss.
COUNTY OF DOUGLAS, }

Summons for District Court.

The State of Kansas, County of Douglas, to the Superintendant of Insurance of the State of Kansas:

You are hereby commanded to notify the Phenix Insurance Company of Brooklyn, that it has been sued by A. B. Kahnweiler and S. B. Kahnweiler, partners as A. B. Kahnweiler & Bro. in the District Court Fourth Judicial District, State of Kansas, sitting within and for the County of Douglas and that it must answer the petition filed against it in the Clerk's office

of the said court on or before the 22 day of Sept., A. D. 1887, or such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on or before the 23rd day of August, A. D. 1887.

21 Witness my hand and the seal of said court, at my office in the City of Lawrence, in the said County of Douglas, this 13th day of Aug., A. D. 1887.

J. L. BRISTOW, *Clerk.*

Indorsed. Suit brought for the recovery of money. Amount claimed $2500 with interest at the rate of...per cent per..... from the 1st day of May, A. D. 1887, and costs.

[SEAL] JOHN HUTCHINGS,
Attorney for Plff.

Indorsed. No. 6032 District Court, State of Kans. Summons. A. B. Kahnweiler & Bro. vs. The Phenix Ins. Co. of Brooklyn. Issued Aug. 13, 1887. Return day Aug. 23, 1887. Answer day Sept. 22, 1887. John Hutchings, Atty. for Plff. Filed Aug. 16, 1889. J. L. Bristow, Clerk.

And thereafter on the 22- day of Sept., A. D. 1887, the defendant filed its demurrer to the plaintiff's petition, which said demurrer is in words and figures as follows, to wit:

In the District Court of Douglas County, State of Kansas.

Demurrer to Petition.

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & BRO., Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendants.

Now comes the defendant, the Phenix Insurance Company of Brooklyn, and demurs to the petition of the plaintiff filed herein for the following reasons, to wit:

1. Because said petition does not state facts sufficient to constitute a cause of action.

Wherefore, defendant prays that plaintiffs take nothing by by their petition, and that defendant be discharged with its costs.

FRANK ROYSE,
Attorney for Defendant.

22 And immediately thereafter, and on the same day, to-wit the 22 day of Sept., A. D. 1887, the defendant filed its petition and bond, as provided by law, to remove said case

from the District Court of Douglas County, Kansas, to the Circuit Court of the United States for the District of Kansas, and which said petition and bond are respectively copied as follows, to wit:

Petition.

Petition for removal on the ground of citizenship, under the act of March 3, 1875, where the adversary parties are all citizens of different States, and all the plaintiffs or all the defendants unite in the petition for removal.

In the District Court of Douglas County, State of Kansas.

Petition for Removal to the Circuit Court of the United State, District of.....

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & BRO., Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

To the Honorable, the District Court of Douglas County, State of Kansas:

Your petitioner respectfully shows to this Honorable Court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner at the time of the commencement of this suit, and still is a citizen of the State of New York, and that A. B. Kahnweiler & S. B. Kahnweiler, plaintiffs were each then, and still are citizens of the State of Kansas.

And your petitioner offers herewith a good and sufficient surety for its entering in said Circuit Court of the United
23 States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of Kansas; and it will ever pray.

FRANK ROYSE,
Attorney for Petitioner Phœnix Insurance Co. of Brooklyn.

STATE OF KANSAS, } ss.
COUNTY OF DOUGLAS. }

I, Frank Royse, being duly sworn, do say that I am a mem- of the firm of — the attorney for the petitioner in the above-entitled cause; that I have read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true as I verily believe.

FRANK ROYSE.

[SEAL] Subscribed by the said Frank Royse in my presence *by* and by him sworn to before me this 22 day of September, A. D. 1887.

J. L. BRISTOW,
Clerk District Court.

Indorsed. Petition to remove cause on ground of citizenship. In the District Court of Douglas Co. Kansas. Term, 1887. A. B. Kahnweiler & Bro., plaintiffs against The Phenix Insurance Company of Brooklyn N. Y. defendant. Petition to remove said cause to the Circuit Court of the United States for the District of Kansas on the ground of citizenship. Filed the 22nd day of September, 1887. J. L. Bristow, Clerk. Frank Royse, attorney for petitioner.

24 *Bond.*

Bond for the Removal of a Cause Under the Act of March, 3, 1875.

Know All Men by These Presents: That the Phenix Insurance Company of Brooklyn as principal, and R. B. Drury and Henry Denton as sureties, are held and firmly bound unto A. B. Kahnweiler and S. B. Kahnweiler, partners as A. B. Kahnweiler & Bro. in the penal sum of five hundred dollars, for the payment whereof well and truly to be made unto the said A. B. Kahnweiler & Bro. their heirs, representatives and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally firmly by these presents.

Yet, upon these conditions: The said The Phenix Insurance Company of Brooklyn having petitioned the District Court of Douglas County, State of Kansas, for the removal of a certain cause therein pending, wherein A. B. Kanweiler and S. B. Kahnweiler, partners as A. B. Kahnweiler & Bro., are plaintiffs, and The Phenix Insurance Company of Brooklyn is defendant; to the Circuit Court of the United States in and for the District of Kansas.

Now, if the said The Phenix Insurance Company of Brooklyn, N. Y., your petitioner, shall enter in the said Circuit Court

of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto,
then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals, this 21st day of September, A. D. 1887.

THE PHENIX INSURANCE COMPANY,
OF BROOKLYN, N. Y. [L. S.]

FRANK ROYSE, *Agent.*

R. B. DRURY, [L. S.]
HENRY DENTON, [L. S.]

25 STATE OF KANSAS, } ss.
COUNTY OF ATCHISON. }

We, R. B. Drury & Henry Denton, both residents of said county, the sureties named in the foregoing bond, being duly sworn, do depose and say that we are each residents of the State of Kansas, and a property holder therein; that we are each severally worth the sum of five hundred dollars, over and above all our debts and liabilities, and exclusive of property by law exempt from execution; that each of us have property in the State of Kansas, liable to execution, of the value of more than five hundred dollars.

R. B. DRURY.
HENRY DENTON.

Subscribed in my presence by R. B. Drury & Henry Denton and by them severally sworn to before me this 21st day of September, A. D. 1887.

[SEAL.]

J. P. ADAMS, *Notary Public.*

My commission expires 4 June, 1888.

Note.—If special bail was originally requisite in said cause, then add "and shall then and—appear and enter special bail in said suit."

It is advisable that the sureties justify, but it is not absolutely necessary.

Indorsed. Bond for removal of cause under act of 1875. In the District Court of Douglas County....Term, 187.... A. B. Kahnweiler & Bro., plaintiff, against The Phenix Insurance Company of Brooklyn, N. Y., defendant. Bond for the removal of said cause to the Circuit Court of the United States for

the District of Kansas, under act of March 3, 1875. Filed the 22d day of September, 1887. J. L. Bristow, Clerk. Frank Royse, attorney for petitioner.

26 And thereafter, and on the 22nd day of November, A. D. 1887, said application to remove said cause to the United States Circuit Court for the District of Kansas, came on to be heard before said court at the November term thereof, and upon consideration thereof by the Court, the following, entry was made by said Court, to wit:

In the District Court of Douglas County, State of Kansas.

Order of Removal.

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & Bro., Plaintiffs.

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendants.

Now on this 22nd day of November, A. D. 1887, at the November term of said District Court come the plaintiffs A. B. Kahnweiler & Bro. by their attorney, John Hutchings and also comes the defendant by Frank Royse, its attorney, and said defendant presents to said Court its petition and bond filed herein by said defendant in said action under provisions of an act of Congress of the United States approved on the 3rd day of March, A. D. 1887, entitled an act of Congress to amend the act of Congress approved March 3rd, A. D. 1875, entitled an act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from the State Courts and for other purposes and further to regulate the jurisdiction of Circuit Courts for the United States and for other purposes and upon application of said defendant it is ordered that the security offered by the said defendant be approved and that the prayer of the petition be granted and that the State Court proceed no further in said cause, and it is also hereby ordered that this case be and the same is hereby removed into the Circuit Court of the United States for the
27 District of Kansas.

STATE OF KANSAS, } ss.
COUNTY OF DOUGLAS, }

I, J. L. Bristow, Clerk of the District Court, sitting in and for said county and State, do hereby certify that the above and foregoing is a true, correct and complete copy of the original paper, pleadings, and orders of the court in case No. 6032 A. B. Kahnweiler & Bro. vs. The Phenix Insurance Company of

Brooklyn, N. Y. as the same now appears of record and on file in my office.

Witness, my hand and the seal of said court, affixed at my office in the City of Lawrence this 23rd day of Nov., 1887.

[SEAL]

J. L. BRISTOW, *Clerk.*

Indorsed. No. 6088. A. B. Kahnweiler & Bro. vs. The Phenix Insurance Company of Brooklyn. Transcript. Filed Nov. 28, 1887. A. S. Thomas, Clerk. By Frank H. Holt, Deputy.

28 UNITED STATES OF AMERICA, DISTRICT OF KANSAS. } ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held in the City of Leavenworth, in said district, on Monday, the 4th day of June, 1888, proceedings were had, and appear of record in words and figures following, to wit:

SATURDAY, June 9, 1888.

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & BRO.,

6088 *vs.*

THE PHENIX INSURANCE COMPANY OF BROOKLYN.

The defendant's demurrer to the plaintiffs' petition herein, came on to be heard and was argued by counsel, on consideration whereof the Court overrules said demurrer, and defendant given *given* leave to file answer in 30 days from this date.

29 In the Circuit Court of the United States, District of Kansas.

Answer.

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & BROTHER, Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

The defendant above named for its answer to the plaintiff's petition herein says:

1st. It denies each and every allegation, statement, and averment contained in said petition except as herein expressly admitted.

2nd. It admits that it is a corporation duly created by and under the laws of the State of New York and that it issued to

plaintiffs a policy of insurance of the date, for the consideration, in the amount, and upon the property mentioned in the petition and that it has not paid to plaintiffs any part of the sum for which said policy was issued.

3rd. This defendant for further answering says that upon the facts stated in the petition herein the plaintiffs are not entitled to any judgment against this defendant in this action.

4th. This defendant further answering says that on January 8th, 1887, the total amount of insurance held by the plaintiffs upon the property mentioned in their petition amounted to the sum of thirty-eight thousand five hundred ($38,500) dollars and in case of any liability of this defendant to plaintiff (which defendant alleges does not exist under the terms of said policy) the whole amount of such liability of defendant to the plaintiffs could only be twenty-five hundred-thirty eight thousand five-hundredths (2500-3850) of the actual cash market value of the stock of goods mentioned in said policy, less a suitable deduction for depreciation of such
30 property from use and otherwise of the stock of goods mentioned in said policy.

5th. Defendant further answering says that said property mentioned in the petition herein was wilfully burned and destroyed by the plaintiffs for the purpose and with the intention of cheating, wronging and defrauding the defendant and such other insurance companies as had issued policies of insurance upon said property, which said policies aggregated the sum of $38,500 at the time of the burning of said property.

Wherefore defendant prays judgment against the plaintiffs for its costs herein.

JACKSON & ROYSE,
Attys for Defendant.

Indorsed. No. 6088. A. B. Kahnweiler & Bro., Plaintiffs, vs. The Phenix Ins. Co. of Brooklyn, Defendant. Answer. Leave given to file within as of time July 17, 1888. C. G. Foster, Judge. Filed July 17, 1888. A. S. Thomas, Clerk. By Frank H. Holt, Deputy Clerk. Jackson & Royes, Attorneys for—

31 In the Circuit Court of the United States for the District of Kansas.

Reply.

A. B. KAHNWEILER and S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & BRO., Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Now come the above-named plaintiffs and for reply to the answer of the defendant herein filed, show to this Court

That they deny each and every allegation in said answer contained.

JOHN HUTCHINGS,
Atty for Plaintiffs.

Indorsed. No. 6088. Circuit Court of the United States, District of Kansas. A. B. Kahnweiler & Bro. vs. The Phenix Insurance Company. Reply. John Hutchings, Atty for Plff. Filed July 26, 1888. A. S. Thomas, Clerk. By Frank H. Holt, Deputy.

32 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said district, on Monday, the 26th day of November, 1888, proceedings were had and appear of record in words and figures following, to wit:

WEDNESDAY, January 2, 1889.

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & BRO.,
6088. *vs.*
THE PHENIX INSURANCE CO. OF BROOKLYN.

Now come the plaintiffs herein by John Hutchings, their attorney, and the defendant by Jackson & Royse, its attorneys, and also come a jury to wit: J. Hanners, S. M. Husted, Granville Griffith, Wm. Goddard, Samuel Hall, Jacob Myers, Sr., S. M. Wells, D. C. Brubaker, A. A. Jellison, Jos. Bradbury, E. D. Giles and H. B. Clark, twelve good and lawful men of the body of the District of Kansas, who being duly impaneled and sworn to well and truly try the matters submitted to them in this action and a true verdict give according to the law and evidence, and thereupon the trial of this case is proceeded with, and not being concluded at the time of adjournment the jurors are admonished by the Court as to their duties herein and the further hearing postponed until to-morrow.

33 In the Circuit Court of the United States for the District of Kansas.

Demurrer to Evidence.

A. B. KAHNWEILER AND S. B. KAHNWEILER, Partners as A. B. KAHNWEILER & Bro., Plaintiffs.

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Comes now the said defendant and demurs to the evidence of the plaintiffs for the following reasons:

I. Because upon the pleadings and evidence the plaintiffs are not entitled to recover.

II. Because the evidence shows that plaintiffs did not make and serve proofs of loss within the time required by the terms of the policy.

III. Because the evidence does not show that before the commencement of this action there was any arbitration and award as to the amount of damages while it does appear from the plaintiff's evidence that there was a difference between the plaintiff and defendant as to the amount of the loss mentioned in the petition before the commencement of this action.

Wherefore defendant asks that the jury be discharged and judgment entered in favor of defendant upon the evidence.

JACKSON & ROYSE,
Attys. for Deft.

Indorsed. No. 6088. A. B. Kahnweiler & Bro. vs. The Phenix Insurance Co. Defendant's Demurrer to Plaintiffs' Evidence. Filed Jany. 2, 1889. Geo. F. Sharitt, Clerk. Jackson & Royse, for Deft.

34 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS, }

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said District, on Monday, the 26th day of November, 1888, proceedings were had, and appear of record in words and figures, following, to wit:

THURSDAY, January 3, 1889.

A. B. KAHNWEILER AND S. B. KAHNWEILER Partners as A. B. KAHNWEILER & BRO., Plaintiffs,
6088. *vs.*
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Now on this 3rd day of January, A. D. 1889, the plaintiffs having offered their evidence in support of and to prove their cause of action and having rested their cause; thereupon the defendant filed its demurrer to the evidence as upon file herein, and the court having heard the arguments of counsel and pending the argument thereon, court adjourned and said cause was resumed on January 3rd, 1889, and the Court being fully advised in the premises does sustain said demurrer for the third reason therein stated, to which decision and ruling the

plaintiffs then and there excepted. It is further ordered that judgment herein be suspended until the motion for new trial herein be heard and determined.

35 A. B. KAHNWEILER AND S. B. KAHNWEILER Partners as A. B. KAHNWEILER & BRO., Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Now comes the said plaintiffs, by their attorney John Hutchings, and move the Court for a new trial herein for the following reasons, to wit:

1st. Because the Court in the trial of this action erred in sustaining the defendant's demurrer to the plaintiffs' evidence introduced on said trial and in discharging the jury impanneled to try said action from the further consideration thereof.

2nd. The Court erred in refusing to submit the said action to the consideration and verdict of said jury upon the pleadings and the evidence of said plaintiffs.

3rd. Because the Court erred in refusing to submit to the findings of said jury the questions of fact as to whether the defendant in this action did or did not waive the requirements in the policy sued on herein that the amount of loss sustained under said policy and the value of the goods therein described should be determined by arbitration.

4th. Because the Court erred in refusing plaintiffs' request to submit this action to the jury for a verdict upon all plaintiffs' alleged waivers of the conditions of said policy.

5th. Because the decision and ruling of said Court in sustaining the defendant's demurrer to plaintiffs' evidence were contrary to the law and the evidence given on the trial hereof.

JOHN HUTCHINGS,
Atty. for Plaintiffs.

Indorsed. No. 6088. Circuit Court of the United States for the District of Kansas. A. B. Kahnweiler & Bro. vs. The Phenix Insurance Co. Motion for New Trial. Filed
36 Jany. 3, 1889. Geo. F. Sharitt, Clerk.

37 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Leavenworth, in said district, on Monday, the 5th day of June,

1893, proceedings were had and appear of record, in words and figures, following, to wit:

MONDAY, July 10, 1893.

A. B. KAHNWEILER & BRO.

6088. *vs.*

THE PHENIX INSURANCE COMPANY OF BROOKLYN.

Now come the parties and submit the motion for a new trial herein. Parties are given until August 1st, 1893, to file briefs.

38 In the Circuit Court of the United States for the District of Kansas, First Division.

A. B. KAHNWEILER & BRO.

vs.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN.

On or about the 8th day of January, 1887, the plaintiffs' stock of merchandise was totally destroyed by fire, excepting about thirty dollars salvage. The stock was insured for over forty thousand dollars in something like twenty different companies. The defendant company had a policy of $2500 on the goods. Shortly after the fire an adjusting agent of the defendant company made a full investigation into the circumstances of the loss and thereupon informed the plaintiffs that their total loss was $22,700, and further said: "We have got to go away and want to settle. We have had dealings with your nationality before." This amount the companies are ready to pay and he was ready to pay the proportionate part due from the Phœnix Company. The insured replied: "We had over $45,000 loss and will not accept any such settlement." On the 4th of February the insured wrote to the office of the company at Brooklyn, N. Y., for blanks on which to make proofs of loss and received an answer from its Chicago office dated February 7th, declining to furnish the blanks. On or about the 23d of February the proofs of loss were made out and were received at the Chicago office in four or five days thereafter. The company made no objection to the proofs of loss or the time of making the same. This suit was commenced on the 13th of August, 1887, about seven months after the fire. The policy of insurance contains the following provisions:

9. "Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company and within thirty days thereafter render a particular and specific account of such loss signed and sworn to by them." * * * * *

39 10. "And the amount of sound value and of damage to property whether real or personal, covered by this

policy or any part thereof, may be determined by mutual agreement between the company and the assured or failing to agree the same shall then be submitted to competent and impartial arbiters, one to be selected by each party, the two so chosen in case of disagreement to select an umpire to whom they shall refer each subject of difference. And the award of any two of them in writing under oath shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of the company, nor any other question, except only the amount of such loss or damage. Each party shall pay their own arbitrator and one-half of the cost of the umpire. It shall be optional with the company to take the whole or any part of the articles at their appraised value, and further, that it shall be optional with this company to repair, to rebuild or replace the property lost or damage- with like quantity or quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proof herein required, and until such proofs * * * * are produced by the claimant and such examinations and arbitrations permitted and had, the loss shall not be payable."

12. "It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided, which is agreed to be a condition precedent, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

The defendant insists that this action can not be maintained. *First*, because the proofs of loss were not rendered within thirty days after the fire. *Second*, because there has been no arbitration to determine the amount of loss sustained. The first objection is untenable. A failure to furnish the proofs of loss within thirty days did not work a forfeiture of the policy. It merely delayed the date when the loss would become payable. The insurer having sixty days after the proofs were furnished to make payment or replace the property destroyed.

Hall vs. Concordia Fire Insurance Company, (Mich.) 51 N. W. 524 Vangindertaelen vs. Phœnix Insurance Company 82 Wis. 112 (51 N. W. 1122).

On the second objection many decisions have been cited by the parties on either side, and the plaintiffs insist that the provision in the policy for arbitration has been waived by the company and is inoperative; that the company could not invoke that provision to abate or defeat the plaintiffs' suit because it made no demand for arbitration, and, because it denies its liability in toto. This denial of liability in toto appears for the first time in the answer of the defendant in this suit. Up to that time the company had offered to pay its proportion of what it claimed was the actual loss of the insured, but there was an irreconcilable difference between the parties as to the amount of that loss, thus bringing the case within the provisions of the arbitration clause of the policy. Inasmuch as the arbitration should precede any suit, at no time during the period for arbitration, did the company deny its liability for the loss. That the company has set up in one count of its answer a denial of any liability does not effect the case. It might waive any objection to the cause of the
41 fire and offer to settle to avoid litigation, but this would not effect its right when sued to set up in its answer any legal defense it had to the action—did the insurance company lose its right to invoke this provision of the policy by not making demand for arbitration? Counsel for plaintiff has cited many authorities on this point, but it will be observed that in the cases cited the provision in the policy was different from this. There the contract provided for arbitration if either party *demanded it in writing.* It was not an absolute covenant, but was optional, nor was it made a condition precedent to the bringing of suit.

See Wright vs. Fire Insurance Company, (Pa.) 20 Atlantic 716.

Nurney vs. Insurance Co. 63 Mich., 633.

Wood on Fire Insurance, Sec. 1015.

Mentz vs. Fire Insurance Co. 79 Pa. St., 478.

7 Insurance Law Journal, 697.

53 Wis. 283.

In Vangindertaelen vs. Phœnix Insurance Company, 82 Wis. 112 (51 N. W. 1122) *supra.* the company rec-ived proofs of loss, but did not make objection to the amount claimed, hence, the insurer having no notice of a disagreement as to loss, took no steps toward arbitration. It must be observed that in the case at law the provision for arbitration is absolute, and forms a part of the contract. It is also in terms declared to be a condition precedent to the bringing of suit. There were no conditions required to make it operative, except a disagreement between the parties touching the amount of loss. If the company

was bound to make a demand for arbitration, when should that demand have been made? There was no time fixed; the plaintiffs had a year after the loss in which to bring their suit, and they could delay arbitration for many months if they desired, so they demanded it before suit was brought and this suit was brought nearly five months before the year expired. I
42 can not see any reason why the company was compelled to take any action in the matter of arbitration before this suit was commenced. It had a right to rest upon the terms of the policy and to expect the assured would bring no suit until they at least attempted to comply with those terms. Whatever difference of views may be found in the decisions of different States, it is enough for this Court to know, and follow the decisions of the Supreme Court, and that Court has held that this provision in the policy of insurance is legal and can be enforced.

Hamilton vs. Liverpool, London and Globe Insurance Co. 136 U. S. 242.

Hamilton v. Home Insurance Co., 137 U. S. 370, 385.

In the first above-cited case the policy provided that in case of difference as to the amount of loss either party should demand in writing that it be arbitrated. There was a difference between the parties and the company demanded arbitration but the assured sought to impose further conditions and the arbitration failed. In that case the court held that the insurance company after making a demand had an absolute right to arbitration; in this case the right was by the terms of the policy itself absolute without any demand. For the reasons above stated, the motion for a new trial must be overruled.

Indorsed. No. 6088. Opinion. Filed Sept. 4, 1893. Geo. F. Sharritt, Clerk.

43 UNITED STATES OF AMERICA, DISTRICT OF KANSAS. } ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the City of Leavenworth, in said district on Monday the 5th day of June, 1893, proceedings were had, and appear of record in words and figures, following, to wit:

MONDAY, September 4, 1893.

A. B. KAHNWEILER & BROS., Plaintiffs,

6088. *vs.*

THE PHENIX INSURANCE CO. OF BROOKLYN, a Corporation, Defendant.

Now on this 4th day of September, 1893, come the above-named plaintiffs by Messrs. Rossington, Smith & Dallas their

attorneys, as also comes the defendant by H. M. Jackson, its attorney and thereon the Court having fully considered the motion for a new trial as filed herein on January 3, 1889, and submitted to this court on the 7th day of August, 1893, upon briefs by the respective parties, and the premises being fully seen and understood, said motion for a new trial is overruled, and denied upon each and every ground thereon, to which ruling and decision of the Court and each and every part thereof, the said plaintiffs then and there excepted. It is therefore ordered and adjudged by the Court that the plaintiffs take nothing by their action that the said defendant go hence without day and recover of the plaintiffs its costs herein taxed at the sum of.....for which let execution issue.

44 In the Circuit Court of the United States for the District of Kansas.

Plaintiffs' Bill of Exceptions.

B. B. KAHNWEILER & BROTHER, Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Be it remembered that on the trial of the above-entitled cause before a jury, on January 2, 1889, at the November, 1888, term of said court, the said plaintiffs, to maintain the issues on their part, offered in evidence and produced the following testimony:

"That the fire from which the loss resulted in this case to recover which this suit was brought, occurred on January 7, 1877;

That the plaintiff, A. B. Kahnweiler, testified that they took the last invoice of said stock of goods, January 1st, 1886, which amounted to $37,147.07; and the freights thereon amounted to $1,114.41; and subsequent purchases amounted to $40,779.09, and freights thereon $1268.61. Amount of stock on hand January 1st, 1886, and subsequent purchases, including freights, $80,309.18.

That they kept an account of sales, and that the sales up to the time of the fire amounted to $42,442.11 less profits at 33⅓ per cent; $10,610.50 leaving a balance of $31,831.61. Sales to the firm $223.33. Total costs of goods sold $32,054.91.

Balance of goods on hand at the time of the fire, at cost, with freight added $48,254.44; goods saved from fire $31.71; balance of stock on hand at cost, with carriage added, $48,222.73. That woolen goods advanced in price and value after the purchase of such stock and before the fire about 15%.

Said witness further testified that there were 21 insurance policies upon said stock, and that some of the adjusters
45 representing several of said companies met at the Eldredge House in Lawrence, Kansas, where said loss occured, and there waited until Mr. Hamlin, the adjuster of the defendant company, arrived. Also that

After Mr. Hamlin, the adjuster of the defendant company arrived, they called on me and we sent the books to the Eldredge House, and I accompanied them and helped. There were eight or ten adjusters, representing different companies, present. Mr. Hamlin was the principal talker, and was the spokesman of the adjusters who had met there.

I went up there to the room where they were engaged several times and they were still engaged in the examination of the books. They told me they were not through with them. They were eight or ten days with the books. They took my examination in writing to which I was sworn. Mr. Hamlin asked the questions about the business to my brother and myself. After they had been through the books they sent for my brother and myself. We went up there. Mr. Hamlin was spokesman for the adjusters and had papers in his hands, and said 'Mr. Kahnweiler, you have had $22,700 worth of goods. We have got to get away and want to settle.' And said 'We have had dealings with your nationality before.' He said this amount the companies were ready to pay, and he was ready to pay the proportionate part of that amount due from the Phenix Company. I told him we had over $45,000 worth of loss, and would not accept any such settlement. My brother and I took the books out of the room. Hamlin followed me into another room and said, 'We'll beat you before a farmers' jury in your own courts.' That was the last that was said between us.

I wrote to the Phenix Company for blanks upon which to make proofs of loss. That letter was dated February 4, 1887, and was written to Brooklyn. Received in reply a letter
46 written from the Chicago office, dated February 7, 1887, declining to furnish such blanks for reasons stated therein."

On cross examination said A. B. Kahnweiler testified that Hamlin said there was $22,700 and odd dollars of goods in the store at the time of the loss. And on cross-examination attorney for defendant presented to said A. B. Kahnweiler, the witness, a paper written in pencil of which the following is a copy:

Purchases Sept. 83 to Jan'y 1887.....		$142,214 13
Merchandise ret'd		883 00
		$139,331 13
Cash Discount 5 %		6,966 00
		$132,365 13
Less paid fire Aug. '84.....		2,139 39
		$130,225 74
Deduct Sales.....	127,703 48	
Less 20 % profit.....	21,283 91	
		106,419 57
		$ 23,806 17
Less 10 % depreciation.....		2,380 61
		$ 21,425 56
And freight		557 06
Loss		$ 21,982 62

Kahnweiler, January 19, '87, M. M. Hamlin.

And said witness testified that this paper is the one which Mr. Hamlin showed to him at the time he made statement that loss amounted to 22,700 and odd dollars, which the companies were willing to pay.

That plaintiffs commenced business in September, 1893, and that the following items copied upon said paper written in pencil were stated to said M. M. Hamlin by Mr. Kahnweiler, to wit:

Purchases September '83 to January '87.....	$142,214 13
Merchandise returned	883 00
Cash discount 5 %.....	6,966 00
Less paid fire, Aug. 84.....	2,139 39
Deduct sales.....	127,703 48
Less 20 % profit	21,283 91
And frieght	557 06

The statement on said paper as follows:

Less 10 % depreciation...	2,380 61

47 was the estimate of said depreciation by the adjuster.

Said witness further testified that soon after said adjusters through Mr. Hamlin made such offer, and on February 4, 1887, he wrote to the company for blanks upon which to make proofs of loss. The company refused to send such

blanks, and they obtained blanks from some other source and made proofs of loss. Such proofs of loss were made February 22, 1887, mailed to defendant February 23, and received by the general agent February 27, 1887.

This was all of the evidence as to the attempted settlement between Mr. Hamlin and the adjusters and the plaintiffs, and as to the time of making proofs of loss, and excuse for delays.

Thereupon, the said defendants filed their demurrer to the evidence so as aforesaid introduced by said plaintiffs, which demurrer, omitting caption, is as follows:

Comes now the said defendant and demurs to the evidence of the plaintiffs, for the following reasons, to wit:

I. Because upon the pleadings and evidence the plaintiffs are entitled to recover.

II. Because the evidence shows that plaintiffs did not make and serve proofs of loss within the time required by the terms of the policy.

III. Because the evidence does not show that before the commencement of this action there was any arbitration award as to the amount of damages, while it does appear from plaintiffs' evidence that there was a difference between the plaintiff and defendant as to the amount of the loss mentioned in the petition.

Wherefore defendant asks that the jury be discharged and judgment entered in favor of defendant upon the evidence.

On the 3rd day of January, 1889, the Court sustained said demurrer for the third reason therein set forth, to which decision and ruling the plaintiffs then and there duly excepted.

48 On the same day, to wit, the 3rd day of January, 1889, the plaintiffs filed their motion for a new trial in the above-entitled cause, and it was thereupon further ordered by the Court that judgment in said cause be suspended until the motion for a new trial therein should be heard and determined. Said motion for a new trial remained pending in said Circuit Court undisposed of until June, 1893, term of said court, and thereupon, on the 4th day of September, 1893, being one of the regular days of said term, the said motion was by the Court denied, and thereupon a final judgment was rendered in said cause in favor of said defendant and against said plaintiffs, to which order of the Court in overruling said

motion and in rendering judgment for said defendant and against said plaintiffs, said plaintiffs then and there at the time duly excepted and except.

And now on this 9th day of October, 1893, during the regular June term of said court, within which judgment was rendered herein said plaintiffs present to the Court their bill of exceptions, and pray that the same may be allowed; and thereupon, said bill of exceptions is by the Court allowed, signed and ordered to be placed on file and made a part of the record in this case.

C. G. FOSTER, *Judge.*

Indorsed. No. 6088. U. S. Circuit Court. A. B. Kahnweiler & Bro. vs. Phenix Ins. Co. of Brooklyn. Plaintiffs' Bill of Exceptions. Filed Oct. 9, 1893. Geo. F. Sharitt, Clerk. Rossington, Smith & Dallas, Topeka, Kansas, Attorneys for Pltffs.

49 In the Circuit Court of the United States for the District of Kansas, First Division.

A. B. KAHNWEILER & BROTHER, Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Now come the plaintiffs, A. B. Kahnweiler & Brother, and respectfully petition and request that a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit be allowed and issued to review the rulings and judgment lately rendered in said cause in the Circuit Court of the United States for the District of Kansas, in the First Division thereof.

Assignments of error are herewith filed as required by the rules of said court.

A. B. KAHNWEILER & BROTH R,
By ROSSINGTON, SMITH & DALLAS,
Their Attorneys.

The writ of error above prayed is hereby allowed this 23d day of October, 1893.

C. G. FOSTER, *Judge.*

50 In the Circuit Court of the United States for the District of Kansas, First Division.

A. B. KAHNWEILER & BROTHER, Plaintiffs,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Now come the said plaintiffs, A. B. Kahnweiler & Brother by Rossington, Smith & Dallas, their attorneys, and file their

petition for a writ of error, with the following assignments of error:

I.

The Court erred in sustaining the demurrer filed by said defendant to the evidence of said plaintiffs upon the trial of said action, as shown by the bill of exceptions filed in said cause.

II.

The Court erred in view of the testimony and circumstances in said case in holding that an arbitration was a condition precedent to recovery upon said policy by said plaintiffs.

III.

The Court erred in rendering judgment on September 4th, 1893, in favor of said defendant and against said plaintiffs.

IV.

The Court erred in not rendering judgment in favor of said plaintiffs and against said defendant upon the testimony in said cause.

A. B. KAHNWEILER & BROTHER,
By ROSSINGTON, SMITH & DALLAS,
Their Attorneys.

Indorsed. No. 6088. Petition for Writ of Error & Assignment of Errors. Filed Oct. 24, 1893. Geo. F. Sharitt, Clerk.

51 KNOW ALL MEN BY THESE PRESENTS,

That we, A. B. Kahnweiler & Brother as principals and A. Marks, are held and firmly bound unto The Phenix Insurance Company of Brooklyn in the full and just sum of three hundred dollars, to be paid to the said The Phenix Insurance Company of Brooklyn, its successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this eleventh day of November, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at the June term, A. D. 1893, of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, in a suit depending in said court, between A. B. Kahnweiler & Brother, plaintiff, and the Phenix Insurance Company of Brooklyn, defendant, judgment was rendered against the said A. B. Kahnweiler & Brother, plaintiffs, and the said A. B. Kahnweiler & Brother have obtained a writ of error

of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Phenix Insurance Company of Brooklyn citing and admonishing it to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said action.

Now the condition of the above obligation is such, that if the said A. B. Kahnweiler & Brother shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

ALFRED B. KAHNWEILER
& BRO., [SEAL]
A. MARKS. [SEAL]

Approved by

C. G. FOSTER. *Judge.*

[SEAL) F. D. BROOKS, *Notary Public.*

Com. Ex. Apl. 6\96.

No. 6088. United States Circuit Court, First Division of the Judicial District of Kansas. A. B. Kahnweiler & Brother vs. The Phenix Insurance Co. Bond, $300.00. Filed Nov. 11", 1893. Geo. F. Sharitt, Clerk.

52 UNITED STATES OF AMERICA, } ss.
DISTRICT OF KANSAS. }

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the case of A. B. Kahnweiler & Brother, plaintiffs, vs. The Phenix Insurance Company of Brooklyn, defendant. No. 6088. I further certify that the original citation and writ of error are returned herewith and made a part of this transcript.

Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 18" day of December, A. D. 1893.

GEO. F. SHARITT, *Clerk.*

Filed Dec. 30, 1893. John D. Jordan, Clerk.

APPEARANCE OF COUNSEL FOR PLAINTIFFS IN ERROR.

And on the thirtieth day of December, A. D. 1893, an appearance of counsel for plaintiffs in error was filed in the Clerk's office of the said Circuit Court of Appeals in words and figures following:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

No. 388. May Term, 1894.

A. B. Kahnweiler & Brother,
Plaintiffs in Error,

vs.

The Phenix Insurance Company.

The Clerk will enter my appearance as Counsel for the Plaintiffs in Error.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
E. J. DALLAS.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit, May Term, 1894, No. 388. A. B. Kahnweiler & Bro., Plffs. in Error vs. The Phenix Insurance Company. Appearance. Filed Dec. 30, 1893, John D. Jordon, Clerk. W. H. Rossington, Chas. Blood Smith and E. J. Dallas, Counsel for Plffs. in Error.

APPEARANCE FOR DEFENDANT IN ERROR.

And on the tenth day of February, A. D. 1894, an appearance of counsel for defendant in error was filed in the Clerk's office of said Circuit Court of Appeals in words and figures following:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

No. 388. May Term, 1894.

A. B. Kahnweiler and Brother,
Plaintiffs in Error,

vs.

The Phenix Insurance Company of Brooklyn.

The Clerk will enter my appearance as counsel

for the Defendant in Error.

H. M. Jackson.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. May Term, 1894. No. 388. A. B. Kahnweiler & Bro., Plffs. in Error vs. Phenix Insurance Co. Appearance. Filed Feb. 10, 1894. John D. Jordon, Clerk. H. M. Jackson, Atchison, Kan. Counsel for Deft. in Error.

APPEARANCE OF MR. CLIFFORD HISTED.

And on the seventh day of January, A. D., 1895, an appearance of Mr. Clifford Histed, counsel for plaintiffs in error was filed in Clerk's office of said Circuit Court of Appeals in words and figures following:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

No. 388. December Term, 1894.

A. B. Kahnweiler and Brother,
Plaintiffs in Error,
vs.
The Phenix Insurance Company of Brooklyn.

The Clerk will enter my appearance as Counsel for the Plaintiffs in Error.

Clifford Histed.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1894. No. 388. A. B. Kahnweiler and Bro., Plffs. in Error, vs. The Phenix Ins. Co. Appearance. Filed Jan. 7, 1895. John D. Jordon, Clerk. Clifford Histed, Topeka, Kan. Counsel for Plffs. in Error.

ORDER OF SUBMISSION.

And on the seventh day of January, A. D. 1895, in the record of the proceedings of said Circuit Court of Appeals is an order of submission of said cause in words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

No. 388. December Term, 1894.

Monday, January 7, 1895.

A. B. Kahnweiler and Brother,
Plaintiffs in Error,

vs.

The Phenix Insurance Company of Brooklyn,
Defendant in Error.

In Error to the Circuit Court of the
United States for the District of Kansas.

This cause having been called for hearing in its regular order, the same was argued by Mr. Clifford Histed in behalf of Plaintiffs in Error and by Mr. H. M. Jackson for Defendant in Error. Thereupon this cause was submitted to the Court upon the transcript of the record from said Circuit Court and the briefs of counsel filed herein.

OPINION.

And on the twenty-sixth day of April, A. D. 1895, an opinion of said United States Circuit Court of Appeals was filed in said cause in the following words, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 388.—December Term, A. D. 1894.

A. B. Kahnweiler and Brother,
Plaintiffs in Error,
vs.
The Phenix Insurance Company, of Brooklyn,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

Mr. Clifford Histed (Mr. W. H. Rossington, Mr. Charles Blood Smith and Mr. E. J. Dallas were with him on the brief) for Plaintiffs in Error.

Mr. H. M. Jackson for Defendant in Error.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

STATEMENT.

This suit was commenced in the Circuit Court of the United States for the District of Kansas, by the plaintiffs in error, A. B. Kahnweiler and Brother against the defendant in error, the Phenix Insurance Company of Brooklyn, to recover the amount alleged to be due on a fire insurance policy. The policy contained, among many others, the following conditions: "10. The amount of sound value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured, or failing to agree, the same shall then be submitted to competent and impartial arbiters, one to be selected by each party, the two so chosen, in case of disagreement, to select an umpire to whom they shall refer each subject of difference, and the award of any two of them, in writing under oath shall be binding and conclusive as to the amount of such loss or damage, but shall not

determine the validity of the contract, nor the liability of this company, nor any other question except only the amount of such loss or damage. Each party shall pay their own arbitrator and one-half the cost of the umpire. It shall be optional with the company to take the whole, or any part of the articles at their appraised value."

"12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, which is agreed to be a condition precedent."

After the goods were burned eight or ten adjusters went to Lawrence, Kansas, where the loss occurred, to adjust the same. Differences arose between the adjusters and the insured as to the amount of the loss, and this is what occurred at their final interview: "After they had been through the books they sent for my brother and myself [the plaintiffs]. We went up there. Mr. Hamlin was spokesman for the adjusters and had papers in his hands, and said: 'Mr. Kahnweiler, you have had $22,700 worth of goods. We have got to get away and want to settle.' And said 'We have had dealings with your nationality before.' He said this amount the companies were ready to pay, and he was ready to pay the proportionate part of that amount due from the Phenix Company. I told him we had over $45,000 worth of loss, and would not accept any such settlement. My brother and I took the books out of the room. Hamlin followed me into another room and said, 'We'll beat you before a farmers' jury in your own courts.' That was the last that was said between us."

Thereafter suit was brought on the policy. The policy was annexed to and made part of the plaintiffs' petition which averred that the plaintiffs had "performed all the conditions of the said policy on their part." The defenses set up in the answer were, first, a general denial, and, second, that the plaintiffs wilfully burned the goods.

After the plaintiffs' evidence was introduced and they had rested the case, the defendant demurred to the evidence for this, among other reasons "Because the evidence does not show that before the commencement of this action there was any arbitration and award as to the amount of damages, while it does appear from the plaintiffs' evidence that there was a difference between the plaintiff and defendant as to the amount of the loss mentioned in the petition before the commencement of this action" The court sustained the demurrer to the evidence upon this ground and rendered judgment "that the plaintiffs take nothing by their action and that the said defendant go hence without day," whereupon the plaintiffs sued out this writ of error.

CALDWELL, J., after stating the case as above, delivered the opinion of the court.

At the threshold of this case, we are confronted with some questions of pleading and practice. In pleading the performance of a condition precedent under the code system, it is not necessary, as it was at com-

mon law, to state the facts showing such performance, but it is sufficient to state generally "that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish on the trial the facts showing such performance." General Statutes Kansas 1889, section 4205.

The policy in suit contains the usual conditions in such policies with reference to notice and proofs of loss, etc., and declares that "until such proofs, plans and specifications, declarations and certificates are produced by the claimant and such examinations and arbitrations permitted and had, the loss shall not be payable." The plaintiffs' complaint made the policy in suit a part thereof and contained the averment that the plaintiffs had "performed all the conditions of the said policy on their part." The only answer to this allegation of the complaint was a general denial. Assuming for the present that the obtaining of an award was a conditon precedent to the right of the plaintiffs to maintain their action, did this general denial put in issue the allegation that the plaintiffs had complied with that condition of the policy? In other words, was the general allegation of due performance properly "controverted" within the meaning of the Kansas code? We think it is clear that it was not. If the defendant intended to rely upon the non-performance by the plaintiffs of one or more of the numerous conditions of the policy, it should have pointed them out specifically and alleged their breach. In no other way could it be known to the parties or the court what issues were to be tried. Under the code, when a defendant relies upon a breach of a condition precedent in a contract as an excuse for not performing the contract on his part, he must set out specifically the condition and the breach so that the plaintiff and the court will be advised of the issue to be tried. *Bliss on Code Pleading* (3d Ed.), Sec. 356a; *Nash's Pleading and Practice*, pp. 300–302, 782. In the case of *Preston* v. *Roberts*, 12 Bush. 570, 583, the Court of Appeals of Kentucky said: "The plaintiff being expressly authorized to plead in that manner [general performance of conditions precedent] the defendant must, if he relies upon the fact that any of the conditions precedent has not been performed, specify the particulars in which the plaintiff has failed (*Newman's Pleading and Practice*, 510, 511; *Henderson & Nashville R. R. Co.* v. *Leavitt*, 16 B. Monroe, 362), thus confining the issue to be tried to such particular condition or conditions precedent as the defendant may indicate as unperformed." See to the same effect *Gridler* v. *Farmers & Drovers Bank*, 12 Bush. 333.

The cases of *Hamilton* v. *Liverpool, etc., Insurance Co.* 136 U. S. 242 and *Hamilton* v. *Home Insurance Co.* 137 U. S. 370 arose in a code state and in these cases the defendant set up the condition precedent relied upon as a defense and specifically alleged its breach and this is believed to be the uniform practice in all code states. It is also the practice in England under a statute, which like our codes, permits a general averment of the performance of conditions precedent by the plaintiff. Under that statute where such a general

averment is made in the declaration, any condition precedent, the performance or occurrence of which is to be contested, must be distinctly specified and its performance negatived in the defendant's answer. For English cases illustrating the rule see *Glenn* v. *Leaf*, 22 Eng. Law and Equity Reports, 489; *Graves* v. *Legg*, 25 Eng. Law and Equity Reports, 552. In the case last cited Lord Chief Baron Pollock observes: "The declaration having averred according to the 57th section of the Common Law Procedure Act the performance of conditions precedent generally, the defendants proceeded in their plea to specify this condition of declaring the names of the vessels as one of the breaches of which they insist."

Moreover, if the plaintiffs failed to show compliance with the alleged condition precedent their cause of action was not thereby barred or extinguished; at most it could only operate to suspend the cause of action and abate the suit. *Clark on Contracts*, 666, 667. In the language of the policy it would simply operate to abate the suit "until after an award shall have been obtained." In other words, when properly pleaded it is a dilatory defense and not one going to the merits of the action. It does not impugn the right of action altogether and is not, therefore, a peremtory plea. At common law dilatory pleas were waived by a pleading to the merits. *Stephens on Pleadings*, 433. Under the code system, matter in suspension or abatement of the action may, and if intended to be relied upon as a defense, must be set up in the answer. It is a defense, and under the code all defenses whether dilatory or peremptory are set up in one answer in separate paragraphs. *Ehrman* v. *Teutonia Ins. Co.* 1 McCrary, 123; *Bliss on Code Pleading*, section 345. Where a dilatory defense is embraced in the answer, the court will direct the jury to determine that issue first and in case their finding on that issue is for the defendant, will see that the proper judgment is rendered thereon. *Ehrman* v. *Teutonia Ins. Co.*, *supra*; *Bliss on Code Pleadings*, section 345.

By failing to set up the condition precedent and its breach in its answer, the defendant waived that defense. If the rule were otherwise a degree of uncertainty would be introduced into the practice in this class of cases much greater even than that which obtained under the general issue at common law. It would be a snare and a pit-fall and neither the plaintiff nor the court would have any knowledge of the issue to be tried. No matter how many conditions precedent the contract contained, the plaintiff would be obliged to go to the expense of preparing to prove performance or waiver of every one of them. An objection of this character cannot be held back, as was done in this case, until at great expense a trial has been gone through with and the plaintiffs have closed their case upon the evidence, and then be brought forward for the first time by way of a demurrer to the evidence. Such a practice would be intolerable. In this connection it is proper to notice another error in the record. If this dilatory defense had been properly pleaded and the issue had been rightfully found for the defendant, the judgment in the case would still be erroneous.

Mr. Stephens (Stephens on Pleading, 107) says that upon the determination of an issue "on a *dilatory plea*, the judgment is, that the *writ*, (or *declaration*) *be quashed*,—upon such pleas as are in abatement of the writ or bill, and, that *the suit do stay or be respited until*, etc., upon such pleas as are in *suspension only;* the effect, in the first case, of course, being, that the suit is defeated, but with liberty to the plaintiff to begin another in more correct form; in the second, that the suit is suspended until the objection be removed. If the issue arise upon a *declaration* or *peremptory plea*, the judgment is in general, *that the plaintiff take nothing, etc.*, and *that the defendant go thereof without day, etc.*, which is called a judgment of *nil capiat.*"

The Court below rendered a judgment of *nil capiat* in this case which would forever preclude the plaintiff from obtaining an award, or recovering on the policy in suit after they had obtained an award. The judgment should have been that the action abate "until after an award shall have been obtained fixing the amount of" the plaintiffs' claim as provided by the policy.

We think the Court erred in its interpretation of the clause of the policy relating to arbitration. If the clause which declares that no action on the policy shall be sustainable "until after an award shall have been obtained" in the manner provided therein, is to be taken literally, then all the insurance company has to do to escape liability altogether is to refuse to appoint an arbitrator and thus make it impossible for the insured to comply with this condition. This shows these conditions of the policy are not to be taken literally. They are to be construed together and must receive a reasonable in erpretation. When it is once established that the meaning of any provision in a policy of insurance is ambiguous or capable of two meanings, then all doubt as to its proper construction vanishes; it must receive that interpretation most favorable to the insured. "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because these instruments are drawn by the company. *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678." *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 297, 2 Wharton on Contracts, 670.

Another well settled rule for the interpretation of all contracts is that the Court will lean to that interpretation of a contract which will make it reasonable and just. *Bishop on Contracts*, Sec. 400. Applying these rules to the tenth clause of this policy its proper interpretation seems quite clear. When there is a difference between the company and the insured as to the amount of the loss the policy declares: "the same shall *then* be submitted to competent and impartial arbitrators, one to be selected by each party * * * ." It will be observed that the obligation to procure or demand an arbitration is not by this clause in terms imposed on either party. It is not said that either the company or the insured shall take the initiative in setting the arbitration on foot. The company has no more right to say

the insured must do it than the insured has to say the company must do it. The contract in this respect is neither unilateral nor self-executing. To procure a reference to arbitrators, the joint and concurrent action of both parties to the contract is indispensable. The right it gives and the obligation it creates to refer the differences between the parties to arbitrators are mutual. One party to the contract cannot bring about an arbitration. Each party is entitled to demand a reference, but neither can compel it and neither has the right to insist that the other shall first demand it and shall forfeit any right by not doing so. If the company demands it and the insured refuses to arbitrate, his right of action is suspended until he consents to an arbitration, and if the insured demands an arbitration and the company refuses to accede to the demand, the insured may maintain a suit on the policy notwithstanding the language of the twelfth section of the policy, and where neither party demands an arbitration both parties thereby waive it.

Undoubtedly there is much implied in every writing whether it be a statute or a contract. It is a maxim that "What is implied in a statute is as much a part of it as what is expressed." (*Wilson County* v. *Third Nat'l Bank of Nashville*, 103 U. S. 770; *Gelpecke* v. *Dubuque*, 1 Wall. 222); and this maxim is equally applicable to the interpretation of contracts. The interpretation contended for by the defendant in error would have the effect to import into the tenth clause of the policy after the words "failing to agree" a clause to the effect that "the insured shall thereupon demand an arbitration;" and also to import into the twelfth clause in order to give it validity this qualifying clause "unless the insured has demanded an arbitration and the company has refused to accede thereto."

The rules for the interpretation of policies of insurance which we have adverted to preclude the court from importing any such clauses into this policy. The effect of doing so would be to construe the ambiguities and uncertainties of the policy in favor of the company and against the insured. We think it is necessarily implied in the tenth clause that before either party can derive any advantage or benefit from this provision, he must indicate his readiness to be bound thereby and demand compliance therewith by the other party. The clause is to be construed the same as if it read "Upon the request of either party." These words or their equivalent are commonly found in similar clauses in policies of fire insurance and they are necessarily and plainly implied in this policy. This is the interpretation placed upon a policy of the defendant in error identical with the one here in suit, by the Supreme Court of Montana. That court, construing the clause in the policy declaring that no suit thereon shall be sustainable until after an award, say, this provision "will come into action to bar plaintiff's recovery where he has refused to arbitrate after the matter for arbitration arose and the same was seasonably sought in conformity with the terms of the policy as was the case in *Hamilton* v. *Insurnnce Co*, 136 U. S. 242, and other cases cited in *Randall* v. *Insurance Co., supra.*" *Randall* v. *Phenix Ins. Co. of Brooklyn*, 35 Pac. Rep. 960.

The conclusion reached is also in harmony with the adjudged cases on this subject arising on other policies. In *Nurney* v. *Firemen's Fund Ins. Co.*, 63 Mich. 633, the policy provided that in case of differences as to the amount of damages the matter should "at the written request of either party be submitted to the judgment of two competent persons to be mutually appointed by the assured and the company," and the policy further provided that no suit should "be sustainable in any court of law or chancery until after an award shall have been obtained in the manner provided." The lower court instructed the jury "that the plaintiff could not maintain his suit until the amount of his loss had first been determined by arbitration or he had given notice to the defendant of his desire to have the same so determined and the defendant had refused or neglected to comply with the request." The Supreme Court held this instruction erroneous and construing this provision of the policy the court said: "Arbitration becomes imperative only after the written request for one has been made. The request as it stands in this policy is optional with either party, and neither of them having availed themselves of the right to arbitrate, it must be deemed waived by both, and in such case was left to the mode of redress provided by the law." In the case of *The Phenix Ins. Co.* v. *Badger*, 53 Wis. 283, the policy provided that the differences should "at the written request of either party be submitted to impartial arbitrators" and that no action should be sustainable in any court until an award had been obtained. Construing this policy the court said: "The imperative part of the first clause is that 'the matter shall be submitted to impartial arbitrators, etc.,' conditional, however, upon the written request of one or both of the parties. It is therefore optional and voluntary or the duty rests upon each party alike to make such written request, and in this case both parties have neglected such duty alike and neither party can complain of the neglect of the other. * * * That there never has been an award is the fault of the company as much as the insured and therefore the company is estopped from taking advantage of the fact that there has not been an award."

In the case of *Wright* against *The Susquehanna Mutual Fire Ins. Co.* (Penna.), 20 Atl. Rep. 716, the provisions of the policy were the same as those contained in the policy in suit in the case of *The Phenix Ins. Co.* v. *Badger*, *supra*, and the court said: "It was the right of either party to demand arbitration; it was the right of either party to waive it and the defendant having made no such demand must be presumed to have waived it." And to the same effect is *Wallace* v. *German-American Ins. Co.*, 4 McCrary, 123.

The case of *Hamilton* v. *Liverpool, London and Globe Ins. Co.*, 136 U. S. 242, cited and relied on by the defendant in error is not in point. The Supreme Court rested its judgment in that case upon the fact "that the defendant had requested in writing and the plaintiff had declined the appraisal provided for in the policy." There was in this case no such request by the insurance company either oral or in writing, but, on the contrary, when the difference arose between the par-

ties over the amount of the loss, instead of suggesting or demanding an arbitration, the defendant's agent addressing the insured, declared to them, "We'll beat you before a farmers' jury in your own courts," thus plainly inviting a suit at law to settle their differences. The insured accepted the gage thus thrown down by the company, and it is now too late for it to recede from the conflict in the arena chosen by itself.

The judgment of the Circuit Court is reversed and the cause remanded with directions to grant a new trial.

Filed April 26, 1895.

JUDGMENT.

And on the twenty-sixth day of April, A. D. 1895, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause in words and figures following, to-wit :—

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 388.—December Term, 1894.

Friday, April 26, 1895.

A. B. Kahnweiler and Brother,
Plaintiffs in Error,

vs.

The Phenix Insurance Company of Brooklyn,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kansas, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that A. B. Kahnweiler and Brother recover against The Phenix Insurance Company of Brooklyn the sum of One Hundred Sixteen and 65\100 Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to grant a new trial.

APPLICATION FOR LEAVE TO PRESENT PETITION FOR REHEARING.

And on the twenty-ninth day of April, A. D. 1895, an application for leave to present petition for rehearing was filed in the Clerk's office of said Circuit Court of Appeals in words and figures following to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

A. B. Kahnweiler and Brother,
Plaintiffs in Error,
vs.
The Phenix Insurance Company, of Brooklyn,
Defendant in Error.

To the Honorable Judges of said Court:

Comes now the above named Defendant in Error, and applies for special leave of the Court, to present its petition for a rehearing in the above entitled cause, after the close of the present term of said Court, for that the judgment in the above cause was rendered on the twenty-sixth day of April, 1895, and that said Defendant in Error, cannot during the present term of said Court, obtain a copy of said judgment and of the opinion of said Court, in the said cause, and prepare its petition for a rehearing, have the same printed and present it, within the time required by Rule 29, of said Honorable Court.

That the Defendant in Error is advised that the present term of this Court will probably close on Wednesday, May 1st, 1895, and that the May term of said Court will commence at St. Paul, on May 6th, 1895.

That Defendant in Error should be allowed thirty days, within which to obtain a copy of the opinion and judgment, and to prepare, have printed and present to this Honorable Court, its petition for a rehearing of said cause.

THE PHENIX INSURANCE COMPANY OF BROOKLYN,
Defendant in Error,
By H. M. JACKSON, its Attorney.

ENDORSED: A. B. Kahnweiler and Brother, Plaintiffs in Error, vs. The Phenix Insurance Company, of Brooklyn, Defendant in Error.

Application for leave to present petition for rehearing.
Filed Apr. 29, 1895.

JOHN D. JORDON, Clerk.

ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING.

And on the twenty-ninth day of April, A. D. 1895, in the record of the proceedings of said Circuit Court of Appeals is an order in said cause granting leave to file petition for rehearing in words and figures following: —

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 388.—December Term, 1894.

Monday, April 29, 1895.

A. B. Kahnweiler and Brother,
Plaintiffs in Error,
vs.
The Phenix Insurance Company,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

Upon application of Mr. H. M. Jackson, counsel for defendant in error, it is now here ordered by the Court that special leave be granted said defendant in error to file a petition for a rehearing after the close of the present term of this Court, said petition for a rehearing to be filed within thirty days from and after the day this order bears date.

PETITION FOR REHEARING.

And on the twenty-ninth day of May, A. D. 1895, a petition for rehearing was filed in the Clerk's office of said Circuit Court of Appeals in words and figures following, to-wit:

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

A. B. KAHNWEILER & BROTHER,
Plaintiffs in Error,

vs.

THE PHOENIX INSURANCE CO. OF BROOKLYN,
Defendant in Error.

PETITION OF THE DEFENDANT IN ERROR FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Circuit:

Your petitioner, the Phœnix (Phenix) Insurance Company of Brooklyn, respectfully represent and shows to your Honors that on August 13th, 1887, the plaintiffs in error filed

their petition in the District Court in and for the County of Douglas, in the State of Kansas, against the defendant in error to recover upon an insurance policy made by the defendant in error and the amount of the loss stated to have been sustained and covered by said insurance policy, a copy of which policy was attached to such petition as a part thereof, the fifth paragraph of which petition was as follows:

"5. That immediately thereafter (refering to the date of the loss) the plaintiffs gave defendant due and legal notice of said loss in writing, and furnished said defendant with proof of their said loss and interest, *and otherwise performed all the conditions of said policy on their part.*" (Record, page 13.)

Said policy sued upon contained the following clause as to time of payment of the loss:

"And to be paid within 60 days after the proofs of the same required by the Company, shall have been made by the insured and received at the office in Chicago, and the loss shall have been ascertained, and proved in accordance with the terms and provisions of this policy." (Record, p. 4, on line 16.)

And said policy also contains the following clause:

"9. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the Company, and within 30 days thereafter, render a particular and specific account of such loss, signed and sworn to by them," and further providing what facts shall be stated or information given by said plaintiffs. (Record, page 7, last clause.)

Said policy contains the further provision as follows:

"10. The amount of sound value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the Company and the assured, or failing to agree, the same may be submitted to competent and impartial arbiters, one to be selected by each party, the two so chosen, in case of disagreement, to select an umpire to whom they shall refer each subject of difference, and the award of any two of them, in writing, under oath shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this Company, nor any other question except only the amount of such loss or damage." (Record, page 8.)

Such policy contains this further provision:

"The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, or (of) replacing the same." (Record, page 9, last clause.)

Said policy further provides:

"12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this Company, for the recovery of any claim, by virtue of this policy, shall be sustainable in any Court of law or Chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, which is agreed to be a condition precedent." (Record, page 10.)

Such action was duly removed to the United States Circuit Court, for the District of Kansas, in which Court and cause defendant filed answer July 17th, 1888, and which answer contained the following allegations after the title of the cause:

"*First.* It denies each and every allegation, statement and averment contained in said petition except as herein expressly admitted." —(Record, page 21.)

Then follows admissions as to the corporate existence of and issuing of the policy sued upon, by defendant.

"*Third.* This defendant (for) further answering says, that upon the facts stated in the petition herein, the plaintiffs are not entitled to any judgment against this defendant in this action." (Record, page 22.)

The fourth clause of said answer alleges

the total amount of insurance and the proportionate amount of the liability of defendant, if any is found to exist.

The fifth clause of such answer alleges the wrong and fraud of the plaintiff's in the burning and destruction of the property. (Record, page 32.)

To such answer the plaintiffs filed their reply which, omitting the title of the Court and cause and of pleading, is as follows:

"That they deny each and every allegation in said answer contained." (Record, page 22, last clause and first two lines on page 23.)

Upon the trial of said cause, upon plaintiff's testimony it was made to appear that subsequent to the loss Mr. Hamlin, the defendant's adjuster, with adjusters representing other companies, met with the plaintiffs, and said adjusters, and through said Hamlin, representing the defendant, estimated plaintiff's loss, from information received from plaintiffs at $22,700.00, and the said Companies offered to pay that amount, and the adjuster of defendant Company offered to pay defendant's proportion of such loss as fixed by the terms of said policy. (Record, pages 31 to 33.)

Upon the giving of such testimony by the plaintiffs on the trial, defendant demurred to such evidence for the following reasons:

"1. Because upon the pleadings and evidence the plaintiffs are not entitled to recover."

"2. Because the evidence shows that the plaintiffs did not make and serve proofs of loss within the time required by the terms of the policy."

"3. Because the evidence does not show that before the commencement of this action there was any arbitration (or) award as to the amount of damages, while it does appear from plaintiff's evidence that there was a difference between the plaintiffs and defendant as to the amount of the loss mentioned in the petition," which demurrer was sustained by the Court. (Record, page 33.)

Thereon, and on January 3rd, 1889, the plaintiffs filed their motion for a new trial upon five grounds which are briefly stated as follows:

1. Error of the Court in sustaining defendant's demurrer to the evidence.

2. Error of the Court in refusing to sub-

mit the case to the consideration and verdict of the jury.

3. Error in refusing to submit to the findings of the jury the cause or fact as to waiver of arbitration.

4. Error of the Court in refusing to submit to the jury plaintiff's alleged waiver of the conditions of the policy.

5. Because the decision in sustaining such demurrer was contrary to law and the evidence. (Record, page 25.)

Such motion for a new trial came on to be heard and was overruled and judgment rendered in favor of the defendant. (Record, page 29, last clause.)

Plaintiffs afterwards filed their petition for writ of error, with the following assignment of errors:

"I. The Court erred in sustaining the demurrer filed by the defendant to the evidence of said plaintiffs upon the trial of said action, as shown by the bill of exceptions filed in said cause."

"II. The Court erred in view of the testimony and circumstances in said case in hold-

ing that an arbitration was a condition precedent to recovery upon said policy by said plaintiffs."

"III. The Court erred in rendering judgment on September 4th, 1893, in favor of said defendant and against said plaintiffs."

"IV. The Court erred in not rendering judgment in favor of said plaintiffs and against said defendant upon the testimony in said cause." (Record, page 35.)

Your petitioner further represents that a writ of error was allowed to this court and the same was submitted on brief and oral argument at the December term, 1894, and on January 7, 1895; and having been taken under advisement, the decision of this Honorable Court was rendered and filed therein, April 26, 1895, and afterwards and during said December term, and on April 29th, 1895, special leave was granted to defendant by order of this Honorable Court to file a petition for a rehearing after the close of said term, the same to be filed within thirty days from and after April 29th, 1895.

And your petitioner would further represent to your Honors that it is advised by its

counsel and avers, that there is manifest error in the said decision and in the opinion of this Court in the respects following, to-wit:

FIRST. This Court was in error in treating the answer as insufficient to authorize the trial court to consider and decide the demurrer to the evidence, and holding that the defendant must by its answer specifically designate what condition precedent of the policy had not been performed by the plaintiffs, and in holding that by reason of defendants failure to indicate in its answer what particular condition or conditions precedent were unperformed by the plaintiffs, the defendant had failed to put the performance of such conditions precedent in issue: and in holding that the Kentucky Code of Civil procedure and the decisions of the Courts of that State were any authority in support of such opinion: and in holding that the Common Law Procedure Act of England and the decisions construing the same are authorities against the sufficiency of defendant's answer to put in issue the performance of such conditions precedent, because such Civil Code of Kentucky and the Common Law Procedure Act of England, are wholly unlike the Code of Kansas, and the decisions of the Courts of Kentucky construing the Code of that State

and the decisions of the English Court in construing the English procedure Act are not proper to be considered in construing the Civil Code of Kansas or the sufficiency of pleadings thereunder.

And your petitioner would further represent that the Code of Kansas provides;

G. S. 1889. "Sec. 4170. The petition must contain:

"*First.* The name of the Court and the County in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word "petition."

"*Second.* A statement of the facts constituting the cause of action in ordinary concise language, and without repetition.

"*Third.* A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and, if interest thereon be claimed, the time from which interest is to be computed shall be also stated.

"Sec. 4205. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly

performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts of such performance.

"Sec. 4177. The answer shall contain:

"*First.* A general or specific denial of each material allegation of the petition controverted by the defendant."

And that under said Section 4177 the defendant was authorized to file an answer containing a *general denial*, and having done so and thereby controverted the allegations of such performance of conditions precedent, the plaintiffs were required under said Section 4205 to establish on the trial the facts showing such performance. It is true that defendant's answer might have contained a specific denial of each material allegation of the petition controverted, which course is made imperative by the Kentucky and English Codes, and in such a case the authorities cited in the opinion would have been in point; but your petitioner states that it ought not to be required to follow the Code of procedure of Kentucky, a copy of which is not to be found in the State library of the State of Kansas.

Your petition further represents that the rule of law as applicable to the Civil Code of Kansas as cited is:

The defense must be either *general* or *special;* it cannot be both. The general denial put in issue every allegation of the petition as fully as the special denial could. 1 Nash. Pl. & Pr. (4 Ed.) 176, and the same author, page 183, says: "Let the denial be general if the truth will admit of it."

Judge Maxwell—Code pleading, page 385, states the same rule as to Nebraska Code, which is identical in such respects with that of Kansas. As does Bliss on Code pleadings (1st Ed.) Sec. 327.

SECOND. Your petitioner further states that it is informed by counsel that this Honorable Court erred in treating the failure of plaintiffs to comply with such conditions precedent as only suspending the action, and that the reliance by defendant upon such failure to demand arbitration was in the nature of a dilatory plea, and not having been so raised by defendant was a waiver of such defense. And respectfully states that during the four years that said cause was pending after the order sustaining the demurrer to evidence, the

plaintiffs had ample time in which to have obtained an arbitration, and thereon applied to the Court wherein said cause was pending, for leave to file a supplemental pleading—under General Statutes, 1889, Section 4227, which provides:

"Either party may be allowed, on notice, and on such terms, as to costs, as the Court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply."

And further your petitioner states that as it is informed by counsel that a judgment upon such matter of abatement, would not have been a judgment upon the merits of the action, and a bar to a subsequent action under the Code of Kansas, General Statutes, 1889, Section 4100, which provides:

"If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or

failure," and which section has been under the consideration of and construed by the Supreme Court of said State, as saving to a plaintiff the right to further prosecute his action in all cases wherein he "Fails otherwise than upon the merits," in the following cases:

Seaton vs. Hixon, 35 Kas., 663.

Thornburg vs. Cole, 27 Kas., 498.

McWhert vs. McKee, 6 Kas., 419.

THIRD. And your petitioner further says that this Honorable Court erred in holding therein that said grounds hereinbefore mentioned were involved in said cause, because neither thereof were included in the assignment of errors as required by Rule 11, of this Honorable Court, and the same, nor either thereof, were presented in or to the Court, below, or to this Honorable Court in or by the argument and brief of counsel for plaintiffs in error, on the submission of this cause.

FOURTH. And your petitioner further says that other error was made by this Honorable Court in the construction of said arbitration clause, and in holding and treating Sec. 10 of said policy as not becoming operative or effective except in case of demand for arbitration by

the defendant: and in holding that said contract of insurance should be construed as of the same effect as those policies which provide that in case "Difference shall arise as to the amount of the loss" arbitration shall be had when requested in writing by either party thereto; and in overlooking or not distinguishing the difference in such contracts and the conditions precedent to a right of action thereon, and in construing a contract that "Arbitration shall be had at the request of either party" as of the same effect as a contract that the amount of damage shall be determined by appraisers, and that such appraisers or arbitration and award as to damages shall be a condition precedent to action, but shall not determine the liability—a distinction which your petitioner begs to suggest is recognized by the Courts which have decided upon and construed such contracts; and the decisions cited in such opinion are not in fact authorities against this defendant in said cause.

And further in holding that the decision of Randall vs. Phenix Insurance Company, 25 Pac. 960, by the Supreme Court of Montana is an authority in this case, and as to the same your petitioner begs to suggest, that since the submission of this cause, counsel for

your petitioner has examined the original record of said cause and finds that in such cause the complaint alleged (clauses 9 and 10 on page 3 of such record) that "Defendant by its adjusting agent requested that the value of such building be ascertained by arbitrators to be mutually chosen" and that the same was accordingly referred to arbitrators mutually agreed upon "Who reported and decided the value of said building at the time of said fire to be $7,179.00" and such record shows (page 14) that on the trial thereof the Court found that it was understood between the plaintiff and defendant that "The estimate so made by said Ketchum and De Noielle (builders) would be as satisfactory and acceptable as an estimate to the Company—defendant—as to the plaintiff" and that said builders accordingly made a detailed estimate or valuation in the sum of $6,410.00, and that said cause and the decision thereof cited and relied upon by this Honorable Court is therefore not an authority applicable to this cause.

And your petitioner begs further to suggest that such Supreme Court of Montana in the last paragraph of such opinion, says, "The question as to whether arbitration is vital to plaintiff's right of recovery depends upon

whether the condition arose requiring arbitration," from all which it appears to your petitioner that said decision does not support the decision of this Honorable Court.

FIFTH. And this Honorable Court further erred in holding that the statement of defendants agent "we'll beat you before a farmers' jury in your own courts" was a waiver of defendant's right to rely upon arbitration, or a bar to a contest in court as to any liability, because the plaintiffs theretofore stated to such agent facts from which plaintiffs loss was correctly estimated to be $21,982.62, but defendant had thereon tendered $22,700.00, which was rejected by plaintiffs, and they demanded the total amount of insurance. The plaintiffs therefore first demanded wager of suit, and having made such demand, defendant had the right to say the "defendant would beat them before a farmers' jury." The right to contest any liability was reserved by the policy in paragraph 10 (record page 9) in these words: "And the award of any two of them (arbitrators) shall be binding and conclusive as to the amount of such loss or damage, *but shall not determine the validity of the contract, nor the liability of the Company, nor any other question except only the amount of such loss or damage.*"

The agreement to submit all questions to arbitration would have been illegal as ousting the courts of jurisdiction to hear and try such cause, but the agreement to submit the amount of damage to arbitrators would not have such effect or be invalid.

The Court further erred in holding that defendant had waived any conditions of the policy for that no waiver had been alleged by the plaintiff, and the evidence did not establish a waiver, nor was such claim made on the trial.

WHEREFORE, Your petitioner prays your Honors to fix a time and place for a rehearing of said cause before this Honorable Court, and that upon such rehearing said cause may be further considered and the said decision reversed, and that all proceedings under such decision be stayed until the further hearing and decision of said cause, and for such further proceedings as may to this Honorable Court seem meet.

THE PHENIX INSURANCE COMPANY, OF BROOKLYN, *Defendant in Error.*

By H. M. JACKSON,
Counsel.

I, the undersigned, sole counsel for defendant in error and petitioner, do hereby certify that I have examined the decision, a rehearing whereof is prayed for by the foregoing petition and respectfully state that I conceive and conscientiously believe that such cause is proper to be reheard.

H. M. JACKSON,
Counsel for Defendant in Error.

ORDER DENYING PETITION FOR REHEARING.

And on the third day of June, A. D. 1895, in the record of the proceedings of said Circuit Court of Appeals is an order denying petition for rehearing in words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

No. 388. May Term, 1895.

Monday, June 3, 1895.

A. B. Kahnweiler and Brother,
Plaintiff's in Error,
vs.
The Phenix Insurance Company of Brooklyn,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on to be heard on the petition filed by the Defendant in Error for a rehearing; and the Court having considered the same and being now fully advised in the premises, it is ordered that said petition for rehearing be, and same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

I, John D. Jordon, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing seventy pages contain full, true and complete copies of all the pleadings, proceedings and record entries including the opinion of said Circuit Court of Appeals in the case of A. B. Kahnweiler & Brother, Plaintiffs in Error, vs. The Phenix Insurance Company of Brooklyn, Defendant in Error, No. 388, December Term, 1894, as the same remain upon the files and records of said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals at the City of St. Louis, Missouri, this nineteenth day of June, A. D. 1895.

(Seal)

JOHN D. JORDON,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.